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THE CONTRACT OF SALE OF GOODS

BY

R. A. EASTWOOD, LL.D.

OF GRAY'S INN AND THE NORTHERN CIRCUIT, BARRISTER-AT-LAW
PROFESSOR OF LAW AND DEAN OF THE FACULTY OF LAW
IN THE VICTORIA UNIVERSITY OF MANCHESTER

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PREFACE

THE series, of which this book is the first instalment, will, it is hoped, meet a need of which teachers of Commercial Law have long been conscious. That the subject of Commercial Law is intrinsically of high educational value is admitted by many, and that it forms an inevitable part of the curricula for degrees in Commerce and for various professional qualifications is undisputed. As yet, however, no text-book has been produced suitable for the more advanced but non-professional student of the subject. Such books as exist either presuppose a knowledge which only the lawyer and the law student are likely to possess or present their subject matter in a form which pays little regard to those principles on which legal teaching ought to be based.

In this series an attempt is to be made to produce a number of short works on the more important branches of Commercial Law, which shall expound and not merely state the law on the topics with which they deal.

Probably nowhere is the need for such treatment more acute than in the topic which forms the subject

of the present volume. Even the law student is not very generously provided for in the subject of the Sale of Goods, and it is hoped that a student faced with that subject in his Bar Final may find the present volume of assistance. But the main purpose of the work is to meet the needs of the business man and the commercial student, and that fact explains the manner in which the subject has been treated. An attempt is made to carry the work to a comparatively advanced stage without assuming much previous legal knowledge. The cases cited are not exhaustive but are chosen mainly because of their suitability as illustrations of the principles discussed.

R. A. EASTWOOD.

25th September, 1929.

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CHAPTER I

THE NATURE AND FORMALITIES OF THE CONTRACT

§ 1. Contracts of Sale and Contracts for Work and Labour

The law applicable to contracts of sale of goods is mainly to be found codified in the Sale of Goods Act, 1893,[1] which codifies the effect of a mass of judicial decisions by which the customs of merchants and the usages of Trade were incorporated into the common law. The Act[2] defines a contract of sale of goods as "a contract whereby the seller "transfers or agrees to transfer the property in "goods to the buyer for a money consideration, "called the price."[3] This definition, it will be

[1] 56 & 57 Vict. c. 71.

[2] Sect. 1 (1).

[3] The price may be fixed by the contract or may be left to be fixed in some agreed manner, *e.g.* by valuation, or may be determined by the course of dealing between the parties, and where the price is not determined in any of these ways, the buyer must pay a reasonable price, the amount of which is a question of fact dependent on the circumstances of each particular case—Section 8.

noticed, covers transactions of two different kinds ; namely, contracts whereby the property in the goods concerned is actually transferred to the buyer, and those which provide that the transfer of the property in the goods shall take place at some future time or subject to some condition thereafter to be fulfilled. For the sake of convenience a contract of the former class is known as a *sale*, whilst a contract of the latter class is called an *agreement to sell*.[1] Both are contracts of sale of goods within the meaning of the Act ; and an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.[2]

A contract of sale of goods may, of course, be made by auction, and, with regard to contracts so made, the Act provides that where goods are put up for sale by auction, in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale ; and a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid. A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller ; and where a right to bid is so reserved, the seller, or any one person on his behalf, may bid

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[1] Sect. 1 (3). [2] Sect. 1 (4).

at the auction. But, on the other hand, where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and the buyer may treat as fraudulent any sale which contravenes this rule.[1]

A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is important, but it is often fine in cases where a person doing work also supplies the materials on which the work is done, as, for example, where one employs a cabinet-maker to make an article of furniture, and the cabinet-maker supplies both the materials and the labour. Fortunately, the rule applicable to such cases, although at one time it was somewhat obscure, now rests on a clear and reasonable basis. In the case of *Lee* v. *Griffin*[2] it was laid down that "if the contract be such that, "when carried out, it would result in the sale of a "chattel, the party cannot sue for work and labour; "but if the result of the contract is that the party "has done work and labour which ends in nothing "that can become the subject of a sale, the party "cannot sue for goods sold and delivered." Thus if a dentist be employed to make a set of false teeth;[3] or a sculptor to make a statue,[4] or an artist to paint

[1] 56 & 57 Vict. c. 71, s. 58.
[2] 1861, 1 B. & S. 272.
[3] *Lee* v. *Griffin*, *supra*.
[4] *Ibid.*

a picture,[1] the contract is one of sale of goods, for when completed it results in the transfer from one of the contracting parties to the other of the property in a chattel. But it is otherwise where, for example, a solicitor is employed to prepare a deed,[2] or a printer to print a book.[3] In such cases what is really contracted for is not the paper and ink used by the solicitor or the printer, but the work which he does; and the contract is one for work and labour.

§ 2. Formalities of a Contract of Sale of Goods

As a rule a contract of sale of goods, like a contract for work and labour, does not require any special formalities; it may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties;[4] and if made in any of these ways the contract, as a general rule, will be valid so far as its form is concerned. But the distinction between a contract of sale of goods and a contract for work and labour becomes important when we come to consider section 4 of the Sale of Goods Act, which prescribes

[1] See the judgment of Blackburn, J., in *Lee* v. *Griffin*, 1 B. & S. at p. 278. But compare the views of Pollock, C.B., in *Clay* v. *Yates*, 1856, 25 L. J. Ex. 237, at p. 242; 1 H. & N. 73, at p. 78.

[2] *Lee* v. *Griffin*, *supra*.

[3] *Clay* v. *Yates*, *supra*.

[4] 56 & 57 Vict. c. 71, s. 3.

for contracts of sale of goods of the value of £10 or upwards special formalities which are not applicable to a contract for work and labour, no matter how great its value may be. That section reads :

> A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, *or* give something in earnest to bind the contract, or in part payment, *or* unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.[1]

For a contract of sale of goods to come within this section it is not essential that every single article which it involves should reach the value of £10. If the contract as a whole involves goods of the aggregate value of £10 or more, the section will apply, no matter how small may be the value of the individual items involved ;[2] for to hold otherwise would be to leave a loophole through which persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the section by making a separate bargain for each article ; and that would be to defeat the very object with which the section was enacted. A similar, though not identical, provision was contained in the Statute of Frauds,[3] whence it was transplanted,

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[1] 56 & 57 Vict. c. 71, s. 4. (The section does not apply to Scotland.)
[2] *Baldey* v. *Parker*, 1823, 2 B. & C. 37.
[3] 29 Car. 2, c 3, s. 17.

with some modifications, into the Sale of Goods Act, 1893 ; and the object of its first enactment was to prevent perjury[1] by requiring adequate evidence of the existence of the contract in cases where, owing to the value of the goods involved, it was thought that a temptation to commit perjury might exist. That object provides a very useful aid to the interpretation of section 4 of the Sale of Goods Act, for some of the words used in that section do not carry the meaning which they bear in ordinary speech ; and a knowledge of the purpose of the enactment will enable the student to see reason in the meanings which the courts have held to apply to the words used.

It will be noticed that the section requires at least one of three conditions to be satisfied before a contract for the sale of goods of the value of £10 or upwards shall be enforceable by action ; that is, there must be *either* (i) acceptance and receipt, or (ii) payment of earnest, or (iii) a written note or memorandum.

§ 3. Earnest, Acceptance and Receipt

The word " earnest " [2] bears the same meaning as it has in everyday speech ; but the words " acceptance " and " receipt " require special consideration,

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[1] See the preamble to the Statute of Frauds.

[2] See the remarks of Fry, L.J., in *Howe* v. *Smith*, 1884, 27 Ch. D. 89, at pp. 101, 102.

for each of them has a particular meaning in the section now under discussion.

Acceptance, as the word is there used, does not mean accepting the goods as satisfying all the requirements of the contract. "There is an accept-"ance of goods within the meaning of this section "when the buyer does any act in relation to the "goods which recognises a pre-existing contract of "sale whether there be an acceptance in performance "of the contract or not."[1] There is acceptance, therefore, as soon as the buyer does any act in relation to the goods which a person would not have done except upon admission that he had made a contract and the goods had been sent in pursuance of it. Thus in the case of *Abbot* v. *Wolsey*[2] a man agreed to buy a quantity of hay of a value greater than £10, and it was arranged that the hay should be delivered by barge at his wharf. When the barge came alongside the wharf he went on board, and rolled over some of the hay of which he took a handful and examined it, and then said that the hay was not according to his sample and he would not have it. It was held that there was evidence upon which the County Court Judge who tried the case might find that there was an acceptance of the hay within the meaning of section 4 of the Sale of Goods

[1] 56 & 57 Vict. c. 71, s. 4 (3).

[2] 1895, 2 Q. B. 97. See also *Page* v. *Morgan*, 1885, 15 Q. B. D. 228; decided on section 17 of the Statute of Frauds. And see *Taylor* v. *Smith* 1893, 2 Q. B. 65; it is submitted that this last case is of doubtful authority.

Act, 1893 ; for his conduct was such as recognised a pre-existing contract of sale. On the same principle where a buyer kept goods an unreasonable length of time after they had been delivered to him it was held that there had been an acceptance.[1] So too there was held to be evidence on which a jury might find that there had been acceptance in a case where a defendant, having verbally agreed to buy sheep which he had selected from the plaintiff's flock and having directed the sheep to be sent to his field, later sent his man to remove the sheep from the field to his farm, where, on their arrival, he counted them over and said "It is all right."[2] In another case, barley lying at a railway station was sold, and the seller directed the railway company to deliver the barley to the buyer. After this the buyer attempted to re-sell the barley, using for the purpose a sample given to him by the seller ; and it was held that his conduct in so doing amounted to acceptance.[3] But in a case where goods were delivered to a person who at once returned them, saying "There is a mistake," it was held that there was no acceptance ; for such conduct was consistent with there never having been any contract entered into at all.[4] It should be noticed that it is not necessary that the act relied on as an acceptance

[1] *Bushell* v. *Wheeler*, 1850, 15 Q. B. 442.

[2] *Saunders* v. *Topp*, 1849, 4 Ex. 390.

[3] *Taylor* v. *G. E. Rlwy.*, 1901, 1. K. B. 774.

[4] *Phillips* v. *Bistoli*, 1823, 2 B. & C. 511. And see the judgment of Brett, M.R., in *Page* v. *Morgan*, 1885, 15 Q. B. D. at p. 232.

should show all the terms of the contract. It is such an act as shows that a contract of sale has been made; there may still be dispute between the parties as to what the terms of that contract are.[1]

Acceptance alone, however, is not sufficient to satisfy the section under discussion. There must also be receipt, though it is immaterial whether acceptance and receipt be contemporaneous or whether either precede the other.[2] Receipt, as the word is used in this connection, is easier to understand than to define, and the Sale of Goods Act, 1893, makes no attempt to provide a definition. Receipt primarily implies delivery,[3] and there is always receipt, though there need not necessarily be acceptance, where the goods are delivered to or into the control of the buyer or of his agent. Again, if the seller delivers the goods to a common carrier, or to a carrier indicated by the buyer, for the purpose of conveyance to the buyer or to some place designated by him, there is deemed to be receipt by the buyer; for in such cases the law regards the carrier as the bailee of the buyer and holds that the seller in employing the carrier is acting as the buyer's agent for that purpose.[4] But there are

[1] Benjamin, *On Sale*, 6th Ed., 239. And see *Tomkinson* v. *Staight*, 25 L. J. C. P. 85.

[2] *Cusack* v. *Robinson*, 1861, 1 B. & S. 299; 30 L. J. Q. B. 261.

[3] Parke, B., in *Saunders* v. *Topp*, *supra*, and see Holroyd, J., in *Baldey* v. *Parker*, 1823, 2 B. & C. at p. 44.

[4] 56 & 57 Vict. c. 71, s. 32. And see *Dawes* v. *Peck*, 1799, 8 T. R. 330; *Dunlop* v. *Lambert*, 1839, 6 Cl. & Fin. 600; *Wait* v. *Baker*, 1848,

some cases in which delivery cannot be, or is not, made, and yet there is deemed to be receipt. Thus a person already having the goods of another in his possession may agree to buy them from the owner ; and receipt can be established by showing that he has done acts which are inconsistent with the supposition that his former possession has remained unchanged, as in a case where the defendant, having in his possession goods belonging to the plaintiff for the purpose of selling them on the plaintiff's behalf, agreed that he would buy the goods himself, and afterwards, after reselling the goods to a third party, delivered to the plaintiff a current account in which he debited himself with the price of the goods as "sold," not adding to or for whom.[1] Again, the goods may be in possession of some third person who is holding them on behalf of the seller ; and then there will be receipt by the buyer, without any actual removal of the goods, as soon as all parties agree that such third party shall hold the goods on the buyer's behalf.[2] But it is essential that seller, buyer and third party should all join in this agreement, for the third party cannot be converted, without his consent, from agent of the

17 L. J. Ex. 307. But the carrier only represents the buyer for the purpose of *receiving*, not the purpose of *accepting*, the goods. *Hanson* v. *Armitage*, 1822, 5 B. & A. 557.

[1] *Edan* v. *Dudfield*, 1841, 1 Q. B. 302. See also *Lillywhite* v. *Devereux*, 1846, 15 M. & W. 291.

[2] *Bentall* v. *Burn*, 1824, 3 B. & C. 423 ; *Tansley* v. *Turner*, 1835, 2 Bing. N. S. 151.

seller into agent of the buyer.[1] In an old case there was a sale of wine which at the time was warehoused with a dock company who were holding it for the seller, and the seller gave to the buyer a delivery order, which, according to the custom of the trade, would have entitled the buyer to delivery of the wine on presenting the order to the dock company and paying the warehouse charges, the amount of which had been deducted from the price. The buyer, however, did not so present the order, and it was held that there had been no receipt; for there could be no receipt "until the dock com-" pany accepted the order for delivery, and thereby "assented to hold the wine as the agents of the "vendee." If the buyer had presented the order and the company had refused delivery to him, there would still have been no receipt, though such refusal on the part of the company might have rendered them liable to an action at the suit of the buyer.[2]

A useful general principle applicable in most cases where any question of receipt arises has thus been formulated by a leading authority.[3] "It is "safe to assume, as a general rule, that wherever no "fact has been proved showing an abandonment by "the seller of his lien, no actual receipt by the

[1] *Farina* v. *Home*, 1846, 16 M. & W. 119; 16 L. J. Ex. 73; Brompton, J., in *Castle* v. *Sworder*, 1861, 30 L. J. Ex. 310; 6 H. & N. 828.

[2] *Bentall* v. *Burn*, 1824, 3 B. & C. 423.

[3] Benjamin, *On Sale*, 6th Ed., 252.

"purchaser has taken place." The lien, as we shall see,[1] is a right given by the Sale of Goods Act, 1893,[2] in certain circumstances, to an unpaid seller who is in possession of the goods to retain possession of them until payment or tender of the price; and the lien is lost when the seller ceases to have possession of the goods, either because he delivers them to a carrier or other bailee for transmission to the buyer without reserving a right of disposal for them or because the buyer or his agent lawfully obtains possession of them.[3] It will be seen, therefore, that the general rule enunciated above is applicable to all cases of receipt which we have hitherto discussed. It has been held, however, that there may be receipt although the goods are and remain in the seller's possession; and if an agreement can be shown whereby the seller undertakes to hold the goods for the buyer instead of on his own behalf a case of receipt sufficient to satisfy the statute is established though actual possession is not altered. Thus in the case of *Elmore* v. *Stone*,[4] the defendant who had bought horses from the plaintiff asked the plaintiff to keep them at livery for him, and the plaintiff then removed them from his sale stable into his livery stable. It was held that there was receipt, because from the moment when the plaintiff accepted the order to keep the horses at livery he possessed them "not

[1] *Post*, p. 101.
[2] 56 & 57 Vict. c. 71, s. 41.
[3] 56 & 57 Vict. c. 71, s. 43.
[4] 1809, 1 Taunt. 458.

" as owner . . . but as any other livery stable " keeper might have them to keep." Such a case, however, does not come within the general test quoted above, for the Sale of Goods Act, 1893,[1] expressly provides that the seller may exercise his lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

§ 4. Note or Memorandum

With regard to the note or memorandum required by the section, it should be noticed that this does not constitute the contract itself; it is merely evidence of it. The effect of absence of the note or memorandum " is not to render the contract " . . . void; still less illegal; but to render the " kind of evidence required indispensable when it " is sought to enforce the contract." [2] Even though there be no note or memorandum of the transaction, and neither of the other requirements of the section be satisfied, there may be nevertheless a valid contract; but although the contract may be valid an action to enforce it cannot be maintained because the evidence which the law requires is not in existence, and the law insists on that evidence in order to exclude fraud or mistake as to the terms of the contract.[3]

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[1] 56 & 57 Vict. c. 71, s. 41 (2).

[2] *Per* Ld. Blackburn in *Maddison* v. *Alderson*, 8 A. C. 467, at p. 448. See also *Morris* v. *Baron & Co.*, 1918, A. C. 1.

[3] See *Johnson* v. *Dodgson*, 1837, 3 M. & W. 653, at p. 659.

From this it follows that even though no note or memorandum be made at the time when the parties enter into the contract, yet if a note or memorandum sufficient to satisfy the section comes into existence before an action to enforce the contract is brought the action can be maintained.[1] But a note or memorandum made after the action is commenced will not do;[2] for an action can only be maintained on such evidence as exists when the action is brought. "The statute requires the "memorandum as evidence, but requires that "evidence to be in existence at the commencement "of the action which is brought to enforce the con- "tract. If, then, it only comes into existence after "the commencement of such an action, and the "plaintiff desires to avail himself of it, he can only "do so by discontinuing the action and com- "mencing another."[3]

On the other hand, it is not essential that the note or memorandum should be expressed in formal or technical language. It has been said that what the law requires is "just such a memorandum as "merchants in the hurry of business might be "supposed to make." It has even been held that a signed letter setting out the terms of the contract for the purpose of repudiating it, if the ground of

[1] *Saunderson* v. *Jackson*, 1800, 2 Bos. & Pul. 238; *Grindell* v. *Bass*, 1920, 2 Ch. 487.

[2] *Lucas* v. *Dixon*, 1889, 27 Q. B. D. 357.

[3] *Per* Fry, L.J., in *Lucas* v. *Dixon*, *supra*, at p. 363.

repudiation is not good in law, may constitute a sufficient note or memorandum.[1] In fact, "any "writing embodying the terms of the agreement "and signed by the person to be charged is suffi- "cient."[2] The person signing the writing may have intended it to be used for some totally different purpose; but his intention is immaterial. "The "Court is not in quest of the intention of the parties, "but only of evidence under the hand of one of the "parties to the contract that he has entered into "it."[3]

At the same time the writing must embody all the essential terms of the contract. It must therefore contain the names of the contracting parties or such a description of them as will serve clearly to identify them.[4] Thus where goods were the sole property of one person who was described in the memorandum as the "proprietor" of them, the description was held to be sufficient.[5] But where a memorandum described a party as the "vendor," it was held that the description was insufficient; for the section "requires the parties "to be described in such a manner that there can "be no fair or reasonable dispute" as to their

[1] *Dewar* v. *Mintoft*, 1912, 2 K. B. 373.

[2] *Per* Lindley, L.J., in *Re Hoyle*, 1893, 1 Ch. 84, at p. 98.

[3] *Per* Bowen, L.J., in the *Re Hoyle*, *supra*, at p. 99.

[4] See *Champion* v. *Plummer*, 1805, 1 B. & P. N. R. 252; *Williams* v. *Lake*, 1860, 2 E. & E. 349; *Bailey* v. *Sweeting*, 1861, 9 C. B. N. S. 843; *Wilkinson* v. *Evans*, 1866, L. R. 1 C. P. 407.

[5] *Sale* v. *Lambert*, 1874, 18 Eq. 1. Parol evidence may be used to identify a party with the description employed.

identities.[1] The same rule applies to the goods which form the subject-matter of the contract. If the goods are not described specifically, they must be referred to by "such words as . . . are the key "to enable you to say with certainty, directly the "key is used, what the (purchaser) contracted to "purchase."[2] Likewise the price, if it is settled, should be mentioned in the note or memorandum; for "if it were competent to a party to prove by "parol evidence the price intended to be paid, it "would let in much of the mischief which it was "the object of the statute to prevent."[3] That does not mean, however, that if no price is mentioned therein the memorandum will be bad. It means only that neither party will be allowed to bring parol evidence to show what particular price was agreed upon; and where a memorandum, in other respects satisfactory, contains no mention of the price, the law will imply an agreement to pay a reasonable price.[4] The memorandum must also contain any special terms of the contract and the signature of the party to be charged, that is, the party against whom the action is being brought, or

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[1] *Potter* v. *Duffield*, 1874, 18 Eq. 4.

[2] *Per* Byrne, J., in *Plant* v. *Bourne*, 1897, 2 Ch. 281, at p. 284. Parol evidence may be used to identify the goods with the description employed.

[3] *Per curiam* in *Elmore* v. *Kingscote*, 1826, 5 B. & C. 583, at p. 584.

[4] *Hoadley* v. *M'Laine*, 1834, 10 Bing. 482. A reasonable price will usually be taken to be the market price of the goods at the date of the contract; but in case of dispute the price may be fixed by a jury under 9 Geo. 4, c. 14, s. 7.

the signature of the agent of that party.[1] The signature, however, need not necessarily be placed at the end of the document. "Whether (it) occurs "in the body of the memorandum, or at the begin- "ning, or at the end, if it is intended for a signature "there is a memorandum of the agreement within "the meaning of the statute."[2] The signature must be so placed, however, "as to shew that it "was intended to relate and refer to, and that in "fact it does relate and refer to, every part of the "instrument. . . . It must govern every part of "the instrument."[3]

It should be noticed that the signature need not necessarily be that of the party to be charged himself. It may, in the words of the section, be that of his "agent in that behalf." The point is of considerable importance because in the ordinary course of commerce contracts are frequently made through agents. Whether an agent has authority to bind his principal by his signature, whether, that is, he can be regarded as an "agent in that "behalf," is a question of fact which has to be decided according to the circumstances of each particular case. The test is whether one would ordinarily expect a person in the position of the agent whose acts are under consideration to have authority to

[1] *Reuss* v. *Picksley*, 1866, L. R. 1 Ex. 342.

[2] *Per* Cave, J., in *Evans* v. *Hoare*, 1892, 1 Q. B. 593, at p. 597. See also *Wade* v. *L. & N. W. Rly. Co.*, 1921, 1 K. B. 582.

[3] *Per* Ld. Westbury in *Caton* v. *Caton*, 1867, L. R. 2 H. L. 127, at p. 143.

sign on behalf of his principal. If one would, then as a rule the principal will be bound even though he has not specifically authorised the agent to sign the document as a record of the transaction.[1] Thus, it has been decided that a broker is an "agent in "that behalf" and his signature will bind the principal who employs him;[2] and it has even been held that where a barrister signs a pleading the pleading as signed may constitute a sufficient memorandum to bind his client, notwithstanding that it may have been signed without any intention of bringing about that result.[3]

Provided that the foregoing conditions are fulfilled the note or memorandum will satisfy the section no matter how informal the writing may be. Indeed, the memorandum need not be on one piece of paper or be contained in one consecutive piece of writing. It is possible for two or more documents to constitute jointly a single note or memorandum, provided that they are sufficiently connected together by internal reference. The exact amount of internal reference necessary, however, has been a matter of doubt. At one time it was thought, on the authority of *Boydell* v. *Drummond*,[4] that the reference must

[1] *John Griffiths Cycle Corporation* v. *Humber & Co.*, 1899, 2 Q. B. 414.

[2] *Thompson* v. *Gardiner*, 1876, 1 C. P. D. 777.

[3] *Grindell* v. *Bass*, 1920, 2 Ch. 487. As to the signature of an auctioneer who acts as agent for both parties, see *Sims* v. *Landray*, 1804, 2 Ch. 318; *Van Praagh* v. *Everidge*, 1903, 1 Ch. 44; *Bell* v. *Balls*, 1897, 1 Ch. 663.

[4] 1809, 11 East, 142; see in particular, Ld. Ellenborough, at p. 157, and Bayley, J., at p. 159.

be of such a nature that the documents could be connected without the assistance of parol evidence. But in that case the judges stated wider propositions than were necessary for their decision on the facts which were before them ; and the modern view is that expressed in *Oliver* v. *Hunting*[1] by Kekewich, J., who said,[2] " I take it . . . that if you find a " reference to something which may be a conversa- " tion, or may be a written document, you may give " evidence to show whether it was a conversation " or a written document ; and, having proved that " it was a written document, you may put that " written document in evidence, and so connect it " with the one already admitted or proved." In fact, " it is difficult to say where parol evidence is to " stop ; but substantially it never stops short of " this, that wherever parol evidence is required to " connect two documents together, then parol " evidence is admissible. You are entitled to rely " on a written document which requires explanation. " Perhaps the real principle on which that is based " is, that you are always entitled in regarding the " construction and meaning of a written document " to inquire into the circumstances under which it " was written . . . to ascertain with reference to " what, and with what intent, it must have been " written." You are entitled to do so, " not to add

[1] 1890, 44 Ch. D 205 ; see also *Studds* v. *Watson*, 1885, 28 Ch D 205.

[2] At pp. 208 *et seq.*

"terms to it, but to find out what the meaning "necessarily must be, having regard to the facts "and circumstances." Hence in the case of *Cave* v. *Hastings*,[1] where a letter contained a reference to "our arrangement," it was allowed to be read as one document with an arrangement set out in a previous note, because parol evidence showed "conclusively that there was no other arrangement "to which (it) could have (been) intended to refer."

[1] 1881, 7 Q. B. D. 125. A letter and the envelope in which it is contained are regarded as one document, and parol evidence may therefore be given to connect a letter with the envelope in which it was sent: *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.

CHAPTER II

CONDITIONS AND WARRANTIES

§ 1. Meaning of Conditions and Warranties

In every contract for the sale of goods there are certain representations of fact with regard to the goods, made expressly or impliedly by the seller. The legal consequences of such representations vary according as the representation amounts to a warranty or to a condition. To be either a warranty or a condition, however, it is essential that the words relied on should amount to something more than a mere expression of opinion or commendation by the seller of his wares. Opinion and commendation of this kind have no legal consequences.[1] A useful test is "whether the vendor assumes to "assert a fact of which the buyer is ignorant, or "merely states an opinion or judgment upon a "matter of which the vendor has no special know-"ledge, and on which the buyer may be expected also "to have an opinion and to exercise his judgment."[2]

[1] *Jeudwine* v. *Slade*. And see *Power* v. *Burkham*, 1836, 4 A. & E. 473.

[2] *Per* A. L. Smith, M.R., in *De Lassalle* v. *Guildford*, 1901, 2 K. B., at p. 221. But see the remarks of Moulton, L.J., in *Heilbutt* v. *Buckleton*, 1913, A. C. at p. 50.

Moreover, the assertion of fact relied on as amounting to a warranty or a condition must be intended by the parties to form part of the contract itself, and it must be made at some stage during the actual negotiation of the contract, though at what stage is immaterial. If it does not so form part of the contract it is a mere representation ; if it should prove to be false, it may or may not be possible for the injured party to claim damages for fraud or recission of contract on the ground of innocent misrepresentation ; but it cannot be made the ground of proceedings for either breach of warranty or breach of condition. In *Hopkins* v. *Tanqueray*[1] a horse belonging to the defendant was to be sold by auction. Before the auction the plaintiff visited the defendant's stable to examine the horse, and while he was examining the animal's legs the defendant said to him, " You have nothing to look " for. I assure you he is perfectly sound in every " respect." " If you say so, I am perfectly satisfied," replied the plaintiff, and thereupon desisted from further examination. The next day the plaintiff attended the auction and, relying on the defendant's previous assertion that the horse was sound, he agreed to buy it. Nothing was said at the auction as to the horse being sound nor was any warranty of soundness then given. The horse proved to be unsound, and it was held that the plaintiff could not

[1] 15 C. B. 130 ; cp. *Russell* v. *Nicolopulo*, 8 C. B. N. S. 363.

found proceedings for breach of warranty on what passed at the defendant's stable ; for the defendant's statement made there was not part of the contract between the parties. It was a mere representation. It was not made at any stage of the negotiations for the sale ; for the only contract which was made between the parties was made at the auction and no warranty was given there.

On the other hand, an assertion or promise that something does in fact exist, made during the negotiations for the contract and intended to form part of the contract, is either a condition or a warranty, and it is necessary to be able to distinguish one from the other, for both do not involve the same legal consequences. Unfortunately, the words used by the contracting parties cannot be regarded as conclusive on this point ; and a stipulation may be a condition, though called a warranty on the contract.[1] It is not the name, if any, which the parties have attached to the stipulation, which determines whether it is a condition or a warranty, but the part which the stipulation plays in the contract ; and the question can only be determined on the construction of the contract and the intention of the parties as gathered therefrom.[2] A condition is a representation of fact which is vital to the existence of the contract, a representation on the truth of which the existence of the contract may depend.

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[1] 56 & 57 Vict. c. 71, s. 11 (1). [2] *Ibid.*

It affects the basis and foundation of the contract to such an extent that it is reasonable to suppose that if the buyer had known it to be untrue he would not have contracted at all. A warranty, on the other hand, is an agreement with reference to the goods forming the subject-matter of the contract of sale, but collateral to the main purpose of such contract ;[1] it relates to a matter of subsidiary importance and does not go to the root of the contract. In the leading case of *Bannerman* v. *White*[2] there was a contract for the sale of a large quantity of hops, at a time when trouble was being caused to the brewing industry in consequence of sulphur getting into the beer through the hops from which it was made being treated with sulphur by the growers. During the negotiations for the sale the defendants, who could not sell to their customers hops that had been treated with sulphur, stated expressly that they would not consider the matter if sulphur had been used ; and the plaintiff replied, " There was no mould this " year and therefore no occasion to use any sulphur." As a matter of fact sulphur had been used in five out of three hundred acres, and the hops from those five acres had become inseparably mixed with the others. The jury found that the contract was subject to the affirmation that no sulphur had been used ; and on this finding it was held that a condition of the contract had been broken. " This undertaking

[1] 56 & 57 Vict. c. 71, s. 62 (1).
[2] 1861, 10 C. B. N. S. 844 ; 31 L. J. C. P. 28.

" (that no sulphur had been used) was a preliminary " stipulation ; and, if it had not been given, the " defendants would not have gone on with the " treaty which resulted in the sale. In this sense " it was the condition upon which the defendants " contracted. . . . The intention of the parties " governs in the making and in the construction " of all contracts. . . . And we think that the " intention appears that the contract should be null " if sulphur had been used."[1] A useful rule to be applied in such cases has been laid down in the following terms : " Where the subject-matter of a " contract of sale is a specific existing chattel a " statement as to some quality possessed by or " attaching to that chattel is a warranty and not a " condition unless the absence of such quality or the " possession of it to a smaller extent makes the thing " sold different in kind from the thing as described " in the contract."[2]

Since a warranty does not affect the foundation of the contract but is collateral to its main purpose, a breach of warranty gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.[3] The breach of a condition, however, is fundamental, and the party breaking it is, in effect, attempting to substitute

[1] *Per cur*, 10 C B. N. S, at p 860.

[2] *Per* Bailhache, J, in *Harrison* v. *Knowles*, 1917, 2 K B, at p 160

[3] 56 & 57 Vict. c. 71, s 62 (1).

something different in kind from the performance which the contract contemplated. To compel him to take the goods and merely to attempt to compensate him by damages would be in substance to force on him a different contract from that which he actually made ; and so the law gives to a party injured by a breach of condition a right to rescind the contract altogether. Recission, however, is not the only remedy open to him ; he may, if he wishes, waive the condition, or he may treat its breach as a breach of warranty giving rise to an action for damages and not as a ground for repudiating the contract.[1]

§ 2. Conditions and Warranties Implied

At common law conditions and warranties were not, as a rule, implied in contracts of sale of goods. The law would give the buyer a remedy if he were led into the contract by misrepresentation or fraud. But beyond that the buyer was left to take care of himself. The maxim was *caveat emptor*; and it was for the buyer to make himself acquainted with the qualities and defects of the goods which he contemplated purchasing or, if he did not wish to do that, require from the seller express stipulations as regards any possible defects it might be desired to guard against. As trade grew, however, the common law rule was found inconvenient, because conditions of commerce did not admit of the buyer

[1] 56 & 57 Vict. c. 71, s. 11 (1).

devoting the time necessary to a complete examination of the goods, and, moreover, it was realised that there were various matters which, according to ordinary business notions, a buyer was entitled to assume, so that in the intention of the parties such matters did in fact form part of the contract although they were not expressly mentioned. It thus came about that, in order to give effect to the presumed intentions of the contracting parties, the law gradually had to admit various implied conditions and warranties in contracts of sale of goods; and the chief of these are now codified in the Sale of Goods Act.

Thus section 12 of the Act provides:

> In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—
>
> (1) An implied *condition* on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.
>
> (2) An implied *warranty* that the buyer shall have and enjoy quiet possession of the goods.
>
> (3) An implied *warranty* that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.[1]

[1] 56 & 57 Vict. c. 71, s. 12.

Thus where there was a contract for the sale and purchase of three thousand tins of condensed milk and when the tins were delivered to the buyer he found that they were so labelled that he could not re-sell them without infringing the trade mark of a third party, it was held that this section had been broken and the buyer could repudiate the contract. The condition given by paragraph (1) had been broken because the seller had not the right to sell goods which would infringe another's trade mark ; and also, since the owner of the trade mark could take proceedings against the buyer if he re-sold the goods, the buyer could not be said to enjoy quiet possession, and so there was a breach of the implied warranty given by paragraph (2).[1]

It should be noticed that since the implied stipulation that the seller has a right to sell the goods is a condition, the breach of it entitles the buyer to recover the whole of the price he has paid for the goods as upon a total failure of the consideration. In a recent case the plaintiff purchased a motor car from the defendant and, after using it for four months, he learned that the person from whom the defendant had bought it had stolen it, and the plaintiff was therefore obliged to restore the car to the true owner. In an action by the plaintiff to recover the price from the defendant, it was argued on the defendant's behalf that since the

[1] *Niblett* v. *Confectioners' Materials Co*, 1921, 3 K. B 386

plaintiff had had the use of the car for four months and further could not return it to the defendant, he could not put the seller *in statu quo*, and therefore the condition ought to be treated as a warranty sounding only in damages. But it was held that the plaintiff could recover the whole of the purchase price ; for he had not got anything of what he had paid for. He had paid for a car to which he would have a good title, and he had got one to which he had no title at all ; and he could not be compelled to restore to the defendant goods which the defendant had no right to receive. [1]

§ 3. Sales by Description

The condition and the two warranties given by the section above quoted are implied in *all* contracts of sale of goods, unless the circumstances show a different intention. The Sale of Goods Act also contains provisions dealing with particular classes of contracts of sale. Thus it is provided that :

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.[2]

That provision is designed simply to give effect to the presumed intentions of the parties to the

[1] *Rowland* v. *Divall*, 1923, 2 K. B. 500.
[2] 56 & 57 Vict. c. 71, s. 13.

contract and to ensure that the buyer is supplied with the thing for which he contracted. In one case there was a contract for the supply of laths which were to be "about" a certain specification; and the contract contained an arbitration clause to the effect that should any dispute arise under the stipulations of the contract the buyers should not reject any of the goods but the dispute should be referred to arbitrators whose award on all points should be final. The sellers delivered laths which were not of the specified length. It was proved that in the market laths of the lengths supplied were not worth the contract price and could not be re-sold so readily as could laths of the specified length. It was therefore held that the implied condition given by the section above quoted had been broken, and notwithstanding the arbitration clause, the buyers could reject the goods.[1] Had the court held otherwise it would have obliged the buyers to take goods of a kind which they did not contemplate when they made the contract, and the intention of the contract would have been defeated. But had laths about the specified length been supplied the intention of the parties as regards the description of the goods contracted for would have been met, and the arbitration clause could then have operated as regards disputes arising between them.

Nor does the fact that the sale is also by sample

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[1] *Vigers* v. *Sanderson*, 1901, 1 K. B. 608.

alter the rule that a party buying goods by description expects to get goods of that description. Thus where there was a contract for "refined foreign "rape-oil, warranted only equal to samples," and oil was supplied which, although equal to sample, did not, in the opinion of the jury, correspond with the ordinary commercial meaning of the words "foreign "rape-oil," it was held that the buyer could reject the goods, for the seller had not supplied that which he had undertaken to deliver.[1]

The principle of such cases is fairly clear. The chief practical difficulty in the application of it lies in deciding when a contract is a contract of sale by description, for it is not always easy to determine whether the particular words used by the seller with reference to the goods are part of the description or amount merely to a collateral warranty; but such difficulty usually can be resolved by the rule that the expression "contract for the sale of goods by "description" applies to all cases where the buyer has not seen the goods but relies solely on the description given by the seller, no matter whether the goods be ascertained or specific.[2]

A further provision relating to the sale of goods by description runs as follows:

> Where goods are bought by description from a seller who deals in goods of that description (whether he be

[1] *Nichol* v. *Godts*, 1854, 10 Ex. 191. See also *Chanter* v. *Hopkins*, 4 M. & W. 399.

[2] *Varley* v. *Whipp*, 1900, 1 Q. B. 513.

> the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.[1]

Here again the Act is merely attempting to give effect to the presumed intentions of the parties who enter into such a contract. In the leading case of *Jones* v. *Just*,[2] a firm of Liverpool merchants contracted to buy from a London merchant a number of bales of manilla hemp which were expected to arrive from Singapore; but when the hemp arrived it was found to be so much damaged that it would not pass in the market as manilla hemp. It was held that the buyers, who had paid the price before the arrival of the hemp and had had to sell it at a considerably less price than it would have realised if it had been undamaged, could recover the difference from the seller; because in every contract to supply goods of a specified description, which the buyer has had no opportunity of inspecting, he is entitled to receive goods which are merchantable under that description.

Unfortunately, difficulty has been experienced in formulating a clear definition of the word "merchantable." At one time it was thought that the test was whether the thing sold was the same in kind as the thing contracted for. Later a less rigid

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[1] 56 & 57 Vict. c. 71, s. 14 (2).
[2] 1868, 3 Q. B. 197. See also *Wren* v. *Holt*, 1903, 1 K. B. 610.

test came to be generally accepted, and it was said that if the goods were bought for re-sale they were merchantable if they were commercially saleable in the market under the description mentioned in the contract, while if they were bought for the purchaser's own use they would be regarded as merchantable if they were reasonably sufficient for the purpose for which they were known to be intended. But these tests, while they do afford practical assistance in many cases, do not explain all existing decisions ; and the whole question of the meaning of the term " merchantable quality " was reviewed in what must now be regarded as the leading case of *Sumner Permain & Co.* v. *Webb & Co.*[1] In that case there was a contract for the sale of a quantity of mineral waters which the sellers were well aware were intended for the re-sale in the Argentine. But the mineral waters supplied happened to contain a small percentage of salicylic acid ; and, since the law of the Argentine prohibited the sale for human consumption of any articles containing that chemical, the buyers claimed that the goods supplied were not of merchantable quality and sought to reject them on the ground that there had been a breach of the implied condition given by section 14 (2) of the Sale of Goods Act. But the Court of Appeal after reviewing all the authorities, held that " merchant- " able quality " simply means that the goods comply

[1] 1922, 1 K. B. 55.

with the description. It does not mean that there shall in fact be persons ready to buy the goods again from the purchaser. When the average man of business talks about goods being of "merchant-" able quality" he has in view their quality or condition, not the question of whether something exists or may arise, outside the goods themselves, which may interfere with their sale. He is thinking of the substance of the goods themselves, and therefore we may say that goods are of merchantable quality if they are in such condition that the average man of business in the trade, in this country, would be satisfied that they fulfilled the description mentioned in the contract.

It will be observed, however, that the section now under review does not give this implied condition of "merchantable quality" in every sale by description; for it provides that if the buyer has examined the goods he cannot claim the benefit of the condition as regards defects which he ought then to have discovered. Thus, a buyer contracted to purchase a quantity of glue which was contained in casks. The sellers offered to show him the glue; but, being pressed for time, he contented himself with looking at the casks and did not ask that any of them should be opened. When the glue was delivered he found that it was in a defective condition and not of merchantable quality; but it was held that he could not repudiate the goods, for the defect in the glue was one which could easily have

been discovered on a proper examination and, since the buyer had not made such an examination when the opportunity to do so had been afforded him, he was precluded from relying on the condition which otherwise would have been implied.[1] To hold otherwise would simply be to protect buyers from the consequences of their own negligence.

§ 4. Goods Sold for a Particular Purpose

Provision is also made by the Sale of Goods Act[2] with regard to goods required for a particular purpose. "Subject to the provisions of this Act "and of any statute in that behalf," so run the opening words of the section in question, "there is "no implied warranty or condition as to the quality "or fitness for a particular purpose of goods supplied "under a contract of sale." That, of course, is merely a restatement of the common law principle of *caveat emptor;* and of the reasonableness of its application as a general rule there can be no doubt. If, for example, a buyer goes to a dealer in glass and asks for a bottle of a certain size, he cannot expect, if he says no more than that, that he will get a bottle which will hold boiling sulphuric acid without cracking. If he desires such a bottle he should stipulate for one which will stand the heat to which he intends to subject it. There may,

[1] *Thornett & Fehr* v. *Beers & Son*, 1919, 1 K. B 485.
[2] 56 & 57 Vict. c 71, s. 14 (1).

however, be circumstances under which, although a buyer does not make such a stipulation in so many words, he does in effect stipulate for an article which shall be suitable for a particular purpose; and it is one of the merits of the Sale of Goods Act that, by means of the following provision,[1] it effectively ensures that in such a case the intentions of the parties shall be carried out:

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.

Thus in the well-known case of *Priest* v. *Last*,[2] where the plaintiff entered a chemist's shop and purchased a hot-water bottle, and a few days afterwards, while the bottle was being used by the plaintiff's wife, it burst and scalded her, it was held that the contract contained an implied condition that the bottle was fit for use as a hot-water bottle, and on that ground the plaintiff was able to recover damages. And the same principle was applied in a case where milk sold contained disease germs the existence of which could be discovered only after prolonged analysis.[3]

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[1] 56 & 57 Vict. c. 71, s. 14 (1).
[2] 1903, 2 K. B. 148.
[3] *Frost* v. *Aylesbury Dairy Co.*, 1905, 1 K. B. 608.

It is, however, a characteristic of useful principles that they may be carried to extremes, and then they tend to defeat the very purpose for which they exist. And the principle now under discussion is no exception to the rule. For example, if a person were to enter a chemist's shop and, after saying that he was suffering from a cough, were to ask the chemist for a certain patent cough cure, he would have gone to a seller dealing in goods of the description which he was buying, and he would have made known to him the particular purpose for which he was buying the article; but he would have done nothing to show that he relied on the seller's skill or judgment. On the contrary, he would have asked for a specific article, and it would be manifestly unjust to burden the seller with responsibility for its fitness. To meet cases of this kind there is added to the section now under discussion a proviso to the effect "that "in the case of a contract for the sale of a specific "article under its patent or other trade name, there "is no implied condition as to its fitness for any "particular purpose."[1] Subject to that proviso, however, there is an implied condition of quality or fitness for a particular purpose in the circumstances already explained. And it should be noticed that the words in which that condition is granted are very wide. The Act does not say "when goods are "sold," but—a far different thing—"when goods

[1] But even there the condition of merchantableness given by s. 14 (2) is implied. See *Bristol Tramways* v. *Fiat Motors*, 1910, 2 K. B. 831.

" are supplied under contract of sale " ; and therefore the implied condition of fitness, where it does arise, attaches not only to the goods which are actually sold but also to the goods which under the contract are necessarily supplied along with the goods actually sold. Thus in *Geddling* v. *Marsh*[1] the buyer purchased a bottle of mineral water and the bottle burst and injured him, and he sought to recover damages on the ground of an implied stipulation that the bottle should be reasonably fit for the purpose. At the time of the purchase he had left a small deposit on the bottle, but the deposit was recoverable when the bottle was returned ; so that while the mineral water itself had been sold the bottle in which it was contained had not. Nevertheless it was held that there had been a breach of an implied condition of fitness because the Act refers to goods " supplied under a " contract of sale " and the bottle in this case was something which had necessarily to be supplied under the contract.

§ 5. Sales by Sample

Another provision of the Sale of Goods Act calls for attention. It runs as follows :

> In the case of a contract for sale by sample,:
>
> (*a*) There is an implied condition that the bulk shall correspond with the sample in quality ;

[1] 1920, 1 K. B. 668.

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(*c*) There is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.[1]

That provision is merely giving effect to the presumed intentions of the parties who enter into such a contract. It does not necessarily follow, however, that, because a sample is shown in the negotiations leading up to the contract, the contract is one for sale by sample. A sample may be produced merely to show the kind of goods which the vendor is offering for sale[2]; but "a contract of sale is a "contract for sale by sample where there is a term "in the contract, express or implied, to that effect,"[3] or, in other words, when it appears from a consideration of the whole of the circumstances of the particular case that the sample has been used in order "to present to the eye the real meaning and "intention of the parties with regard to the subject-"matter of the contract which, owing to the imper-"fection of language, it may be difficult or impossible "to express in words."[4] Where that is the function of the sample it is clear that the law, by recognising

[1] 56 & 57 Vict. c. 71, s. 15 (2).
[2] See *Gardiner* v. *Gray*, 4 Camp. 144.
[3] 56 & 57 Vict. c. 71, s. 15 (1).
[4] *Per* Ld. Macnaghten in *Drummond* v. *Van Ingen*, 1887, 12 A. C. 284, at p. 297.

the conditions implied by the section above quoted, is doing nothing more than give effect to the agreement which the parties have made.

Difficulties have sometimes been experienced in deciding the meaning of " a reasonable examination " of the sample " as those words are used in the section under discussion ; but such difficulties disappear if once the underlying fact be realised, that the Act does nothing more in this respect than give statutory expression to the ideas of right and wrong entertained by the average man of business engaged in buying and selling, so that " a reasonable examina- " tion of the sample " merely means such an examination as is customary in the course of the particular trade concerned, A firm of cloth merchants ordered from manufacturers some worsted coatings which were to be equal in quality and weight to certain samples. The object of the merchants was to re-sell the cloth to clothiers and tailors, and this was known to the manufacturers ; but the cloth when supplied was found to contain a defect which would render it unfit to stand the strain of ordinary wear when made up in the form of clothes, and on that ground it was unmerchantable. The defect, however, existed in the samples as well as in the cloth supplied ; and the question therefore arose whether the buyers ought to have discovered it when they examined the samples. It was proved that they had applied the tests which were normally applied in the trade and further that the defect in

the cloth was such as those tests would not reveal. On the other hand, to discover the defect the test which would have had to be applied was comparatively simple ; but it was not customary in the normal course of the trade to apply it, and on that ground it was held that the defect did not fall within the meaning of the words " apparent on a reasonable " examination of the sample."[1] Such a state of the law would appear to be reasonable. The sample " cannot be treated as saying more than such a " sample would tell a merchant of the class to which " the buyer belongs, using due care and diligence, " and appealing to it in the ordinary way and with " the knowledge possessed by merchants of that " class at the time. No doubt the sample might " be made to say a great deal more. Pulled to pieces " and examined by unusual tests which curiosity " or suspicion might suggest it would doubtless " reveal every secret of its construction. But that " is not the way in which business is done in this " country."[2]

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[1] *Drummond* v. *Van Ingen, supra.*

[2] *Per* Ld. Macnaghten in *Drummond* v. *Van Ingen, supra.*

CHAPTER III

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

§ 1. Property and Possession

Before proceeding to that branch of the law relating to the sale of goods which must now engage our attention, it is necessary that the reader should appreciate the fact that the property in goods sold may pass to the buyer, although the seller still retains possession of the goods ; for property and possession, although in everyday speech they are often confused, are in law words with quite distinct meanings.

Possession is a question of fact. It involves two distinct elements, one of which is mental or subjective, the other physical or objective.[1] On the mental or subjective side, he who has possession of an article intends to exercise over it at least some degree of control whereby he can exclude others from its enjoyment ; and on the physical side, " though he need not be in actual contact with it, " (he) must doubtless have it so far under his " control as to be able, unless overpowered by

[1] Salmond, *Jurisprudence*, 7th Ed., p. 298.

" violence, to exclude others from its enjoyment." [1] Thus a servant entrusted with the goods of his master, a person who borrows goods, a thief who steals them, a carrier to whom they are entrusted for conveyance, all have possession of goods which are not their own property ; for property means something different from possession.

Property signifies plenary control over an object,[2] " the sum of all the ways in which a movable or " immovable thing can be *lawfully* used and enjoyed, " together with the right to the possession of the " same." [3] It is the passing, as between the buyer and the seller, of the property in the goods forming the subject-matter of a contract of sale to which we must now turn our attention.

§ 2. The Time when the Property Passes

The question of the time at which the property so passes may often be of considerable importance, for it is enacted that " unless otherwise agreed the " goods remain at the seller's risk until the property " therein is transferred to the buyer, but when the " property therein is transferred to the buyer, the " goods are at the buyer's risk, whether delivery has " been made or not," except that " where delivery " has been delayed through the fault of either buyer " or seller, the goods are at the risk of the party in

[1] Holland, *Jurisprudence*, 11th Ed, p. 191. [2] *Ibid.*, p. 204.
[3] Willis, *Contract of Sale of Goods*, 2nd Ed., p. 10.

"fault as regards any loss which might not have "occurred but for such fault."[1]

The Sale of Goods Act provides that "where "there is a contract for the sale of unascertained "goods no property in the goods is transferred to "the buyer unless and until the goods are ascer- "tained."[2] The distinction between ascertained and unascertained goods can be appreciated best by the aid of a simple illustration. Let us suppose that a greengrocer has twenty oranges, among them being one of peculiar shape or size. If a man contracts to purchase that particular orange there is a contract for the sale of a specific article or, in the language of the Sale of Goods Act, an *ascertained* thing. But if he contracts to purchase three oranges, without specifying which particular three he desires, the contract is one for the sale of *unascertained* goods. It is quite obvious in such a case that the intention of the parties could never have been that the property in three oranges should pass to the customer as soon as he said he would buy. Before any property can pass it is essential that three oranges should be taken from the greengrocer's group of twenty for the purpose of being handed over to the customer; and when that is done the three oranges in question become ascertained goods.[3] But it should be noticed that the Act does not say that the property shall pass as soon as

[1] 56 & 57 Vict. c. 71, s. 20.
[2] *Ibid.*, s. 16.
[3] See *White* v. *Wilks*, 5 Taunt. 176.

the goods become ascertained; it merely states that no property can pass before the goods are ascertained. When they are ascertained "the "property in them is transferred to the buyer at "such time as the parties to the contract intend it "to be transferred."[1] And the Act[2] gives the following rules for ascertaining the intention of the parties in this matter, and they are to be applied unless a different intention appears:

> RULE 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

It is necessary to a proper appreciation of this rule that the reader should have a true conception of the difference between a contract which is conditional and one which is unconditional. Every contract is an agreement, and the parties to it may agree on any lawful terms they choose. They may, for instance, agree simply for the sale and purchase of a certain article at a certain price: and in that case they are making a contract which is unconditional. But the parties are at liberty, if they so desire, to insert terms which have the effect of suspending the operation of the contract until the happening of a certain event. Thus one may agree to purchase a

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[1] 56 & 57 Vict. c. 71, s. 17. [2] *Ibid.*, s. 18.

platinum brooch if an independent valuer shall deem that it is worth the price which is asked for it. Again, the parties may insert terms which provide for the contract being set aside if something be not done within a specified time after the contract is made. Thus the particulars of sale by auction sometimes provide that the goods may be re-sold by the vendor if the price agreed at the auction be not paid within twenty-four hours afterwards. In cases of these two last-mentioned kinds the contract is conditional, and the rule now under discussion can have no application until the condition has been fulfilled.

Nor is the requirement that the contract should be unconditional the only one which must be satisfied before the rule can be applied. The contract, further, must be one for the sale of specific goods which are in a deliverable state ; and the Act defines deliverable state in these terms : " Goods are in a " ' deliverable state ' . . . when they are in such " a state that the buyer would under the contract " be bound to take delivery of them." [1] In other words, goods are in a deliverable state when they are complete in the form in which the parties may reasonably be said to have contemplated them when they made the contract. Thus A. and B. contracted that the former should sell to the latter for £145 a stack of hay then standing in A.'s field. The contract was made in January, but it was agreed

[1] 56 & 57 Vict. c. 71, s. 62 (4).

that the stack should be allowed to remain where it was until May. In the meantime, however, later in January, the stack was destroyed by an accidental fire ; and it was held that the loss fell on the buyer ; for the property, though not the possession, had passed to him. " The rule of law is that where " there is an immediate sale and nothing remains " to be done by the vendor as between him and the " vendee, the property in the thing sold vests in " the vendee." [1]

On the other hand, if a case arose in which the facts were similar but something did remain to be done to the goods by the seller as between him and the buyer, the goods would not be in a deliverable state, and it would be the following rule which one would have to consider in deciding the time at which the property passed :

> RULE 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof.

Thus let us suppose that A. goes to B. in order to buy from him logs of a certain length, and on being shown some trees growing on B.'s land, agrees to take them at an agreed price in the form of logs of the specified length. The property in the timber cannot pass to A. before the trees have been felled,

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[1] *Tarling* v. *Baxter*, 1827, 6 B. & C. 360 ; and see *Dixon* v. *Yates*, 1833, 5 B. & Ad. 313.

the branches cut away and the trunks sawn into the contemplated logs, because until those things have been done the goods are not in a deliverable state.[1] The same principle is to be applied to a contract for the sale of a specific article which at the time when the contract is made is not yet in existence, as, for example, a contract to purchase something which the vendor is to manufacture. "Until the last of "the necessary materials be added . . . the thing "contracted for is not in existence. . . . And we "have not been able to find any authority for saying, "that while the thing contracted for is not in exist-"ence as a whole and is incomplete, the general "property in such parts of it as are from time to "time constructed shall vest in the purchaser."[2] Thus a man ordered a boat-builder to build him a barge, and paid money on account as the work proceeded. The work reached the stage when the name of the purchaser had been painted on the stern of the vessel, but the barge was not yet complete when the boat-builder became bankrupt. It was held that no property had passed to the buyer.[3] In all these cases, however, the general rule will yield to a sufficient indication of a contrary intention in the contracting parties. Thus, in one case [4] a firm of merchants contracted with a ship-builder that

[1] See *Acraman* v. *Morrice*, 1849, 8 C. B. 449; 19 L. J. C. P. 57.
[2] *Per cur.* in *Clarke* v. *Spence*, 1836, 4 A. & E. 448.
[3] *Mucklow* v. *Mangles*, 1808, 1 Taunt. 318.
[4] *Clarke* v. *Spence*, *supra*.

he should build them a vessel at an agreed price. It was arranged that the work should be superintended by an agent of the purchasing firm and payment should be made by instalments regulated by particular stages in the progress of the work. It was held that the property in the materials vested in the purchasing firm at the time when each stage of construction, under the superintendence of their agent, was completed, or, at all events, when the instalment due for that stage was paid. The facts that the contract provided for superintendence by the agent of the purchaser, and further that the work was divided up into agreed stages, showed an intention that the property should pass as the work proceeded.

The underlying principle on which is based the rule just discussed also forms the foundation of the next, which reads :

> Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Thus in *Simmons* v. *Swift*[1] a contract was made for the sale and purchase of a stack of bark standing near the bank of a river, and the buyer undertook to take the whole stack at an agreed sum per ton

[1] 1826, 5 B. & C. 857.

and to pay for it on a specified date. At the time when the contract was made the weight of bark in the stack was unknown, but five days later some of the bark was weighed and delivered to the buyer. Before any more could be weighed, however, the river overflowed its banks and carried away what remained of the stack. It was held that the loss fell on the seller. The property in that part of the stack which had been weighed and delivered had passed to the purchaser, but the property in what remained was still in the seller.

Such a rule is obviously in accordance with the presumed intentions of the parties to such a contract. But the case is by no means so clear when instead of the seller being the person who is to weigh, measure or test the goods it is agreed that the buyer shall do that work. In such a case it may well be that the parties intend the property to pass before the actual weight is known ; and so in the case of *Furley* v. *Bates*,[1] where the facts were similar to those in *Simmons* v. *Swift* except that it was agreed that the buyer should at his own expense weigh the goods at a weighing machine past which they would have to be carried in transit to his premises, it was held that the property passed to the buyer before the weighing had taken place ; and a view was put forward that in all cases where the weighing, measuring or testing is to be done by the buyer

[1] 1865, 2 H. & C. 200.

the property will pass to him before such thing be done. One may doubt, however, whether the case can be treated as an authority for a proposition couched in such wide terms. We have already seen [1] that the fundamental principle is that the property shall pass when the parties intend it to pass ; and while the fact that the buyer is to do the weighing, measuring or testing does admittedly in the majority of cases indicate an intention that the property should pass to him, cases are none the less quite conceivable in which the facts might show a contrary intention. It is submitted, for instance, that a material question might be whether a buyer weighing the goods does so on his own behalf or merely as agent for the seller, for in the latter event *Furley* v. *Bates* would hardly cover the case. It is significant that in *Furley* v. *Bates* the weighing was to be done at the buyer's own expense. Had the seller agreed to bear that expense and the buyer to conduct the weighing merely for the seller's convenience, the facts would seem then to have indicated a different intention.

A further rule deals with cases in which goods are delivered on approval and enacts :

> Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer :—
>
> (*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

[1] *Ante*, p. 45.

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

In this rule again the Sale of Goods Act is doing nothing more than give effect to what it is reasonable to presume is the intention of the parties who make such a contract; and if this be kept in mind it renders easier the answer to the only question arising out of the rule which provides a difficulty to the average student—what is an "act adopting "the transaction?" "'The transaction' cannot "mean the delivery of the goods to the buyer on "sale or return—that he adopted when he received "the goods upon those terms. The meaning must 'be—adopting the transaction in such a way as to 'make him the purchaser. There must be some 'act by the person to whom the goods have been 'delivered which he would only have a right to do "if he were the purchaser and the property had "passed to him."[1]

Consequently where jewellery was delivered "on sale or return" and the person to whom it was so delivered pledged it with a pawnbroker who took it in good faith, it was held that the person who

[1] *Per* Ld. Esher, M.R., in *Kirkham* v. *Attenborough*, 1897, 1 Q. B. 201, at p. 203.

originally delivered it to the pledgor could not recover it from the pawnbroker. By pledging it the pledgor had done an "act adopting the transaction"; the property in the goods had passed to him, and he could therefore validly give to the pawnbroker the rights of a pledgee over them.[1] The original owner of the jewellery had his remedy in an action on the contract for the price.

In the practical application of this rule, however, it is very important to keep in mind the fundamental principle that the property in the goods which form the subject-matter of a contract of sale "is "transferred to the buyer at such time as the parties "to the contract intend it to be transferred,"[2] and the rules now under discussion only apply unless a contrary intention appears.[3] Such a contrary intention is often very clearly apparent from the express terms on which goods are in some cases delivered on approval. Thus in a well-known case the facts were the same as those in the case just cited except that the jewellery was handed to the person who subsequently pledged it on the terms of a special approbation note which bore the following printed heading: "On approbation. On sale for cash "only or return. From Samuel Weiner, Diamond "Mounter and Manufacturing Jeweller. Goods "had on approbation or on sale or return remain "the property of Samuel Weiner until such goods

[1] *Kirkham* v *Attenborough*, *supra*

[2] *Ante*, p. 45.

[3] *Ibid.*

"are paid for or charged. The consignees are "responsible for these goods until they are returned "to my possession." It was held that since these words sufficiently indicated an intention to exclude the ordinary rule, the jeweller could recover the goods from the pawnbroker.[1]

Nor is it always necessary in order to exclude the operation of the ordinary rule that an intention to do so should be manifested in express terms. Such an intention may be implied from trade usage; for where there is a trade usage contrary to the rule and both contracting parties are in the trade in which the usage is observed it is reasonable to suppose that their intentions will best be met by giving effect to the usage. In some trades, for instance, goods are delivered on approval for a certain length of time, often fourteen days, but by the custom of the trade the property in the goods does not pass to the buyer on the expiration of that time, but the seller, when the time has expired, may call upon the buyer either to take the goods or return them at once; and in such a trade the property in the goods may not pass to the buyer until such a notice has been served on him and he has failed to return them.

The reader will have observed that all the rules which hitherto we have discussed assume the existence of a contract for the sale of specific or

[1] *Weiner* v. *Gill*; *Weiner* v. *Smith*, 1905, 2 K. B. 172.

ascertained goods. We have already pointed out,[1] however, that where there is a contract for the sale of unascertained goods no property in them can pass to the buyer until the goods become ascertained, and, further, when the goods do become ascertained the property in them passes at such time as the parties intend it to pass. As an aid to the discovery of their intention in this matter the Act provides the following rule which is applicable where no different intention appears :

> RULE 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

In practice the application of the rule is most frequently required in those cases where there is a bargain for the sale of a certain quantity of goods out of a larger quantity, and there is a power of selection in the vendor to deliver, or in the purchaser to take, what he thinks fit. It is obvious that the property in the goods cannot pass until that selection is made. " If I agree to deliver a certain " quantity of oil as ten out of eighteen tons, no one " can say which part of the whole I have agreed to

[1] *Ante*, pp. 44, 45.

"deliver until a selection is made. There is no "individuality until it has been divided."[1] And therefore, where, as usually happens, the selection or approbation is to be made by the seller, the property in the goods passes to the buyer as soon as the seller has made the appropriation and the buyer has assented to it ; and it has been held that if the seller sends to the buyer notice of appropriation and the buyer does not promptly reply, his assent may be inferred when a reasonable time has elapsed after receipt of the notice.[2] Moreover, there are cases in which the buyer's conduct may be construed as a giving of assent in advance ; and so where an English buyer wrote to a Swiss seller requesting him to forward by post a certain quantity of dye, it was held that the goods were unconditionally appropriated to the contract when a packet containing the specified quantity was posted and, further, that the buyer's assent had been given in advance when he wrote to the seller.

It should be noticed also that although selection is the most frequent way of appropriating goods to the contract it is not by any means the only way. In fact, whenever goods have been dealt with in such a way as to show that they are exclusively intended to fulfil the contract they may be said to have been unconditionally appropriated to the

[1] *Per* Bayley, B., in *Gillet* v. *Hill*, 1834, 2 C. & M. 530, at p. 535.
[2] *Pignataro* v. *Gilroy*, 1919, 1 K. B. 459.

contract. Thus A. purchased from B. a quantity of bricks and sent his agent with an order for delivery. B.'s foreman to whom the order was presented informed the agent that he would deliver as soon as he could get rid of a man who was in possession under a distress and at the same time pointed to some clumps of bricks, some of which were in a finished and some in an unfinished state, as being those from which the delivery would be made. It was held that in thus indicating the clumps the foreman had made a sufficient appropriation to pass the property. "The well-known "rule that the property does not pass to the buyer "while anything remains to be done by the seller, "either to complete the goods or to ascertain the "price, does not apply to the present case. There "is no doubt that the parties could pass the pro-"perty in all the bricks, whether finished or not, "*if such was their intention.*"[1] Similarly where coals were shipped from London to Rangoon and at the latter port the seller gave to the purchaser the bill of lading and the policy of insurance relating to them, it was held that the goods had been unconditionally appropriated to the contract. Such documents entitle the holder of them to claim the goods to which they relate, and consequently from the time of their delivery "what had originally been "an agreement to supply any coals answering the

[1] *Young* v *Matthews*, 1867, L. R. 2 C. P 127.

" description became an agreement relating to those " coals only, just as much as if the coals had been " specified from the first." [1]

On the same principle the Sale of Goods Act itself provides that " where, in pursuance of the " contract, the seller delivers the goods to the buyer " or to a carrier or other bailee or custodier (whether " named by the buyer or not) for the purpose of " transmission to the buyer, and does not reserve " the right of disposal, he is deemed to have uncon- " ditionally appropriated the goods to the con- " tract." [2] But where the seller appropriates goods to the contract he may, " by the terms of the . . . " appropriation, reserve the right of disposal of the " goods until certain conditions are fulfilled. In " such a case, notwithstanding the delivery of the " goods to the buyer, or to a carrier or other bailee " or custodier for the purpose of transmission to " the buyer, the property in the goods does not " pass to the buyer until the conditions imposed by " the seller are fulfilled." [3]

§ 3. C.I.F. AND F.O.B.

The foregoing rules are of considerable importance in those classes of contracts which are called respectively C.I.F. and F.O.B.

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[1] *Calcutta Co.* v. *De Mattos*, 1863, 32 L. J. Q. B. 322. But see *post* C.I.F. and F.O.B.

[2] 56 & 57 Vict. c. 71, s. 18, rule 5 (2).

[3] 56 & 57 Vict. c. 71, s. 18.

A C.I.F. contract is made where goods are to be shipped by the seller and it is agreed that the sum to be paid by the buyer shall cover not only the cost of the goods but the premium for their insurance during transit and the freight for their carriage. The essential feature of such a contract is that performance is satisfied by delivery of documents and not by actual physical delivery of the goods. "All "that the buyer can call for is delivery of the cus- "tomary documents. This represents the measure "of the buyer's rights and the extent of the vendor's "duty. The buyer cannot refuse the documents "and ask for the actual goods, nor can the vendor "withhold the documents and tender the goods "they represent."[1] Thus, where under the terms of a C.I.F. contract the buyer agreed to pay "net "cash" the seller was held to be entitled to payment upon tender of the shipping documents, notwithstanding that the goods by that time had not reached their destination.[2]

The chief difficulty arising out of such contracts is that of deciding on whom the risk is to fall and in whom the property is vested. In answering those questions the fact that the payment made by the buyer includes the cost of insurance from the time of shipment is very material; for, as a rule, a person

[1] McCardie, J., in *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.*, 1919, 1 K. B. 198, at p. 202.

[2] *E. Clemens Horst & Co.* v. *Beddell Bros.*, 1912, A. C. 18. Such payment would not affect the buyer's right to reject the goods if, when delivered, they were found not to be in accordance with the contract.

does not insure goods against a risk which will fall on some other party. "The liability to insure "and the fact of insurance are, I think admittedly, "strong indications pointing to the individual on "whom it is designed that the risk of loss shall "fall. It is reasonable so to consider them, for "the casting of the liability on a man is a tolerable "warning to him that he will suffer damage in the "case of accident, unless he guards himself against "it; and the fact of his insurance is a pregnant "acknowledgment that he fears to encounter it, "and accepts the burthen which the liability "implies."[1] For that reason in a C.I.F. contract the risk *primâ facie* attaches to the buyer as from the time of shipment of the goods. "At the port of "shipment . . . the vendor ships the goods in- "tended for the purchaser under the contract. "The goods are at the risk of the purchaser against "which he has protected himself by the stipulation "in his C.I.F. contract that the vendor shall, at his "own cost, provide him with a proper policy of "marine insurance intended to protect the buyer's "interest and available for his use, if the goods "should be lost in transit."[2]

For the same reason the property in the goods also *primâ facie* passes to the purchaser as from the

[1] *Per* Ld. O'Hagan in *Anderson* v. *Morice*, 1876, 1 A. C. 173, at p. 743. See also *per* Blackburn, J., in *Allison* v. *Bristol Marine Insurance Co., Ltd.*, 1876, 1 A. C. 209, at p. 229.

[2] *Per* Kennedy, L.J., in *Biddell Bros.* v. *E. Clemens Horst & Co.*, 1911, 1 K. B. 934.

date of shipment. But property and risk are not inseparable, and there may be cases in which, although the risk has passed to the buyer, the property has not.[1] Whether or not the property has passed is entirely a question of intention. Where the intention of the parties is expressed no difficulty arises ; but in the majority of cases there is no expression of intention, and intention has to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case. Most C.I.F. contracts deal with unascertained goods, and in the absence of express intention, the provisions, already quoted,[2] of rule 5 of section 18 of the Sale of Goods Act are material. By shipment the seller appropriates the goods to the contract. For the property to pass, however, the rule requires not merely that the goods should be appropriated to the contract but that they should be *unconditionally* so appropriated. Moreover, the same section of the Sale of Goods Act contains provisions which determine whether or not goods put on board ship are *unconditionally* appropriated to the contract. "Where, in pursuance of the contract, the seller "delivers the goods . . . to a carrier . . . (whether "named by the buyer or not) for the purpose of "transmission to the buyer, and *does not reserve* "*the right of disposal*, he is deemed to have

[1] *Martineau* v. *Kitching*, 1872, L. R. 7 Q. B. 436 ; *per* Blackburn, J., at p. 453. See also *The Parchim*, 1918, A. C. 157, particularly, p. 168.
[2] *Ante*, p. 55.

" unconditionally appropriated the goods to the " contract." [1] Conversely " the seller may, by the " terms of the contract or appropriation, *reserve the* " *right of disposal* of the goods until certain con- " ditions are fulfilled. In such a case, notwith- " standing the delivery of the goods to . . . a carrier, " or other bailee or custodier for the purpose of " transmission to the buyer, the property in the " goods does not pass to the buyer until the con- " ditions imposed by the seller are fulfilled." [2]

Applying these rules to the problem now under consideration of the C.I.F. contract, we may say that appropriation of the goods to the contract takes place on shipment ; and on the question of whether that appropriation is unconditional or conditional depends the question of whether or not the property in the goods passes to the buyer when shipment is made. Whether the appropriation is conditional or not depends largely on the form which the bill of lading takes. If by the terms of the bill of lading delivery is to be to the buyer or his agent, then *primâ facie* the property in the goods passes on shipment, because in such a case the buyer as holder of the bill of lading may demand the goods from the ship. But this *primâ facie* rule may be displaced if, although the bill of lading is made out to the buyer or his agent, the seller retains the bill of lading as security for the price. In that case the appropriation

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[1] *Ante*, p. 58. [2] *Ibid.*

is conditional on the price being tendered, and so the property does not pass until tender of the price is made. And the Sale of Goods Act expressly provides that " where the seller of the goods draws " on the buyer for the price and transmits the bill " of exchange and the bill of lading to the buyer " together, to secure acceptance or payment of the " bill of exchange, the buyer is bound to return the " bill of lading if he does not honour the bill of " exchange, and if he wrongfully retains the bill " of lading the property in the goods does not pass " to him."[1] On the other hand, if the bill of lading makes the goods deliverable to the seller or his agent, the *primâ facie* rule, as we have seen, is that the property does not pass on shipment for the appropriation is conditional since the seller has a right of disposal. In such a case the property remains in the seller until he receives payment from the buyer in exchange for the documents of title, because, " when the vendor on shipment takes the " bill of lading to his own order, he has the power " of absolutely disposing of the cargo, and may pre- " vent the purchaser from ever asserting any right " of property therein."[2]

[1] 56 & 57 Vict. c. 71, s. 19 (3).

[2] *Per* Cotton, L.J., in *Mirabita* v. *Imperial Ottoman Bank*, 1878, 3 Ex. D. 164, at p. 172. See the decisions quoted in the judgments in this case. See also *Biddell Bros.* v. *E. Clemens Horst & Co.*, 1911, 1 K. B. 934; 1912, A. C. 18; *Ryan* v. *Ridley*, 1902, 8 Com. Cas. 105; *The Parchim*, 1918, A. C. 157; *The Prince Adalbert*, 1917, A. C. 586; *Stein, Forbes & Co.* v. *County Tailoring Co.*, 1917, 86 L. J. K. B. 448. See also Kennedy, *C.I.F. Contracts*, pp. 141 *et seq.*

Such problems do not arise in so very complicated a form in those contracts which are termed F.O.B. A contract F.O.B. is one under which the goods are to be shipped by the seller "free on "board." The effect of such a contract may, of course, be varied by special terms contained therein; but under the normal F.O.B. contract the contractual liability of the seller ceases when he has put the goods on board. At that point the property in the goods passes to the buyer. In view of the principles discussed in the foregoing pages this is easy to understand where the goods are specific or ascertained. At first glance, however, the hurried reader may be surprised to find that the same rule applies to unascertained goods. He might argue, as have counsel in several reported decisions, that the property in goods cannot have passed to the buyer unless the goods were appropriated to him when they were shipped.[1] It must be kept in mind, however, that the rules with regard to the passing of the property in goods, which the Sale of Goods Act sets forth, only apply unless a contrary intention appears.[2] The fundamental rule is that the property passes "at such time as the parties "to the contract intend it to be transferred."[3] And it is held that the fact that the parties contract on the terms "free on board" is evidence of an intention that the property should pass on shipment.

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[1] See *ante*, p. 55. [2] *Ante*, p 45. [3] *Ante*, p. 45.

"I see no reason why a person should not agree "to buy and pay for a portion of a cargo, say "of sugar in bags or of corn in bulk, although the "actual sugar or corn to be delivered may not be "ascertained before the ship is unloaded." [1]

[1] *Per* Baggallay, L.J., in *Stock* v. *Inglis*, 1884, 12 Q. B. D. 564, at p. 577. See also 10 A. C. 263; *Wimble* v. *Rosenberg*, 1913, 3 K. B. 743; *Maine* v. *Sutcliffe*, 1917, 23 Com. Cas. 216; *Colley* v. *Overseas Exporters*, 1921, 3 K. B. 302; *Cunningham Ltd.* v. *Munro & Co., Ltd.*, 1922, 28 Com. Cas. 42.

CHAPTER IV

TRANSFER OF TITLE

§ 1. The General Rule

The uninitiated reader may experience a tendency to confuse the subject-matter of the present chapter with that which was dealt with in the preceding chapter. And in truth the distinction between property and title, though real, is one which many persons would find it difficult to express in words. Property is a right, or sum of rights ;[1] but antecedent to every right there is a title, a fact which vests the right in the person who enjoys it.[2] Now titles may be valid or defective ; and it does not necessarily follow that merely because, as between the buyer and the seller of goods, the property in the goods has passed to the buyer the buyer will be able to keep the goods as his own; for some third person may claim the goods from the buyer on the ground that he has a better title to them. And it is to the rules and principles of law by which the validity or otherwise of such a

[1] *Ante*, p. 43
[2] See Salmond, *Jurisprudence*, 7th Ed., pp. 357 *et seq.*

claim is determined that we must now turn our attention.

Now it is a general principle of the common law that nobody can have a better title to goods than had the person from whom he took them, and that principle is thus enacted in the Sale of Goods Act : " Where goods are sold by a person who is not the " owner thereof, and who does not sell them under " the authority or with the consent of the owner, " the buyer acquires no better title to the goods " than the seller had." [1] But no general principle of law, however admirable it may be in itself, can ever be applied in extreme cases without causing hardship ; and so, on grounds of convenience, and having regard to the exigencies of modern commerce and the notions of persons engaged therein, the law admits exceptions to the general principle now under discussion.

§ 2. Conduct precluding a Denial of the Seller's Authority

One such exception exists where the true owner of goods has acted in such a way with reference to the person who sells them as to lead innocent parties dealing with that person to believe that he is the owner or has the owner's authority to sell. In such a case it would be unjust to allow the true owner to recover the goods from an innocent third

[1] 56 & 57 Vict c. 71, s 21 (1).

party taking them; for the owner has by his conduct induced the belief that the seller had authority to sell; and so the Sale of Goods Act excepts from the operation of the general principle quoted above cases where "the owner of the goods "is by his conduct precluded from denying the seller's authority to sell."[1] Thus A. mortgaged his machinery to B., thereby vesting in B. the legal ownership of the machinery. But A., as is usual in the case of a mortgage, continued in possession of the machinery. Later A. got into financial difficulties, and his goods were taken in execution, among them being the machinery in question; but B., although he knew of the execution, made no attempt to prevent the sheriff from selling the machinery. He waited until it had been sold and then claimed it from the buyer. It was held that he could not do so because by his conduct he had led people to believe that he had no claim on the machinery.[2]

§ 3. Market Overt

A further exception may arise where goods are sold in market overt. Market overt, or open market, is a name which attaches to any fair or market held on a particular day for a particular place under the

[1] 56 & 57 Vict. c. 71, s. 21 (1). And see *Henderson* v. *Williams*, 1895, 1 Q. B. 521.

[2] 1596, 5 Rep. 83 b.

authority of a grant from the Crown or by custom or prescription which implies a grant from the Crown ; and by the custom of the City of London a sale made in any shop in the City between the hours of sunrise and sunset in the ordinary course of the seller's business may be a sale in market overt. And the rule is that " where goods are sold " in market overt, according to the usage of the " market, the buyer acquires a good title to the " goods, provided he buys them in good faith and " without notice of any defect or want of title on " the part of the seller." [1]

But for this rule to operate several conditions must be observed. In the first place, the goods must be of a kind in which the trader professes to deal as a regular part of his business, and secondly the sale must take place within the usual market hours. Moreover, the goods must be exposed publicly and openly to view, and the whole transaction must be commenced and completed in the open market. Thus in a case where goods were sold in a shop in the City of London at a time when the shutters were up it was held that the privilege of market overt could not be claimed. And a similar decision was given when the sale took place in a showroom, over a shop in the City of London,

[1] 56 & 57 Vict. c. 71, s. 22. The above provision does not affect the law relating to the sale of horses, as to which see 2 & 3 Ph. & Mary, c. 7, and 31 Eliz. c. 12.

to which customers were only admitted by special invitation.[1] On the same principle a sale by sample is not sufficient, unless the bulk as well as the sample be openly sold and transferred in the open shop or market, for " a sale in market overt requires " that the commodity should be openly sold and " delivered in the market."[2] And although the point is not yet definitely decided, it would seem that the privilege of market overt would not cover a sale to the trader in his shop. " The custom as " stated by Lord Coke is that the shop is market " overt ' for such things only as by the trade of the " ' owner are put there to sale.' Blackstone says, " ' Every shop in which goods are exposed publicly " ' to sale is market overt for such things only as " ' the owner professes to trade in,' *i.e.* the owner " of the shop. When a casual person having " jewellery for sale goes into a jeweller's shop to " sell it, if he can, to the jeweller, it seems to me " that his goods so offered for sale to the one " person who is carrying on business in that shop " are neither ' put there to sale ' nor ' exposed " ' publicly to sale,' expressions which seem to me " to point to goods placed in the shop by or with " the consent of the shopkeeper for sale to all comers " prepared to buy."[3] Moreover, there is one case in which even a sale in market overt, complying

[1] *Hargreave* v. *Spink*, 1892, 1 Q. B. 25.
[2] *Hill* v. *Smith*, 4 Taunt. 533.
[3] *Per* Wills, J., in *Hargreave* v. *Spink*, *supra*, at p. 28.

with all the requisite conditions, will not protect the purchaser ; for it is enacted that " where goods " have been stolen and the offender is prosecuted " to conviction, the property in the goods so stolen " re-vests in the person who was the owner of the " goods, or his personal representative, notwith- " standing any intermediate dealing with them, " whether by sale in market overt or otherwise."[1] But the word " stolen," as used in this provision, is used in the technical sense to denote an offence amounting to larceny ; and " where goods have " been obtained by fraud or other wrongful means " not amounting to larceny, the property in such " goods shall not re-vest in the person who was the " owner of the goods, or his personal representative, " by reason only of the conviction of the offender."[2]

§ 4. Sale under a Voidable Title

A third exception is provided by the following section: " When the seller of goods has a voidable " title thereto, but his title has not been avoided at " the time of the sale, the buyer acquires a good title " to the goods, provided he buys them in good " faith and without notice of the seller's defect of " title."[3] The reader will arrive at an easier appreciation of this provision if he will recall the

[1] 56 & 57 Vict. c 71, s. 24 (1). And see 7 Edw. 7, c. 23, s. 6 ; 6 & 7 Geo. 5, c. 50, s. 45.

[2] 56 & 57 Vict. c. 71, s. 24 (2).

[3] *Ibid.*, s. 23.

distinction between the meanings of the words *void* and *voidable* as applied to contracts. A void title is really no title at all ; it is a title, if such it may be called, like that of a thief, which is empty of all legal effect. But a voidable title is one which comes into existence as a valid title but is nevertheless defective in that it may be rendered void if the requisite steps for that purpose are taken. Thus if a purchaser induces a contract of sale of goods by fraud he acquires a voidable title to the goods, and the other contracting party may if he wishes render it void. Until he does so, however, the title is valid ; for the law holds that it would be contrary to policy to provide that fraud should make a contract void from the beginning, since it may sometimes happen that the person who has committed the fraud may find it to his advantage that the contract should be avoided. It is therefore left to the party who has suffered from the fraud to make his choice ; but if before the seller makes that choice the fraudulent buyer re-sells the goods to an innocent third party, that third party acquires a good title because he took the goods at a time when the person from whom he acquired them had a valid title, and since also he took in good faith and without notice of the fraud it would be unreasonable to saddle him with the consequences of it. Thus X. obtained a quantity of iron ore from Y., paying for it by a bill of exchange and saying that the acceptor of the bill was a well-known tradesman in

Rochester. It was discovered subsequently that no such person existed and that the address given, as his address, was false. Had the question been one between X. and Y. alone, Y. could have recovered the ore on the ground of fraud entitling him to rescind the contract. But, in this case, before Y. discovered the fraud, X. had sold the ore to a person who, the jury found, purchased it *bonâ fide* and without notice of the fraud; and it was held that such person acquired a good title.[1]

§ 5. Sale by a Mercantile Agent

Lastly, the Sale of Goods Act provides:

(1) When a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) When a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without

[1] *White* v. *Garden*, 10 C. B. 919.

> notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.[1]

And the effect of a transfer by a mercantile agent in possession of goods or documents of title with the consent of the owner is to make the transaction as valid as if the mercantile agent had been expressly authorised by the owner of the goods to make it, provided that the person dealing with him acts in good faith and has not at the time of the transaction notice that the agent has not authority to make it.[2]

The policy of the law, as expressed in the section just quoted, is obviously reasonable. A buyer by allowing the seller to retain possession of the goods or documents of title, or a seller by allowing the buyer to obtain them, creates a situation which is calculated to induce in third parties the belief that the person in possession is the owner of the goods; and it would be unreasonable to deprive innocent third parties who have acted in that belief of the title which they had grounds to expect they would acquire. Thus in a well-known case there was a contract for the sale of a cargo of

[1] 56 & 57 Vict. c. 71, s. 25. The term "mercantile agent" has the same meaning as in the Factors Acts; namely—any agent who has in the ordinary course of his business authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods. See 52 & 53 Vict. c. 45, s. 1.

[2] 52 & 53 Vict. c. 45, s. 2.

copper which was shipped to the buyers. The sellers also forwarded to the buyers a bill of lading endorsed in blank relating to the cargo together with a draft for the price which the buyer was to accept, and as between sellers and buyer, it was not intended that any property in the copper should pass until the draft had been accepted. The buyer, however, being insolvent did not accept the draft, but he did endorse the bill of lading to third parties in fulfilment of a contract which he had previously made for the sale of the copper to them, and they took the bill of lading in good faith. It was held that the transfer of the bill of lading to the third parties gave them a good title to the copper.[1]

It should be noticed that sub-section (1) of the section now under consideration will only apply where a person *has sold* goods, and sub-section (2) is only applicable where one has *bought or agreed to buy* goods. The latter point is often of considerable importance in connection with so-called hire-purchase contracts; for it sometimes happens that a person who has obtained possession of goods under such a contract disposes of them to an innocent third party before all the instalments have been paid, and the question then arises as to whether the goods can be recovered from such third party by the person from whom they were originally obtained under the hire-purchase contract. The answer to

[1] *Cahn & Mayer* v. *Pockett's Bristol Channel Steam Packet Co., Ltd.*, 1899, 1 Q. B. 643.

that question depends on the terms of the so-called hire-purchase contract. It may, on the one hand, amount merely to a contract of hire with an option to purchase, and in that case the goods can be recovered, provided that the option has not been exercised, for in that case the hirer has neither bought nor agreed to buy the goods. But on the other hand if the hiring contract imposes an obligation to buy the goods cannot be recovered. In one case, the terms of the agreement stated that the owner of a piano agreed to let it on hire to another person in consideration of "a rent or hire instal-"ment" of ten shillings and sixpence per month. It also provided that the hirer might terminate the agreement at any time by returning the instrument to the owner, the hirer remaining liable for all arrears of hire; and, conversely, if the hirer should punctually pay all the monthly instalments, the piano should become his absolute property, but until full payment should be made the piano should continue the sole property of the owner. When only a few instalments had been paid the hirer pledged the instrument with a pawnbroker. It was held that the piano could be recovered by the owner, because the hirer had not *agreed to buy*. "From a legal point of view the (owner) was in "exactly the same position as if he had made an "offer to sell on certain terms, and had undertaken "to keep it open for a definite period. Until "acceptance by the person to whom the offer is

" made there can be no contract to buy."[1] Where, however, the agreement imposes an obligation, as distinct from a mere option, to buy the case is different. Thus an agreement stated that the owner of furniture agreed to let it on hire to a certain person who agreed to pay " as and by way of rent for the " hire and use of the said furniture," the sum of £1 on May 6, and the further sum of £96 4*s.* 3*d.* on August 1, 1892. It further provided that as soon as such payments had been made the furniture should become the sole and absolute property of the hirer, but on the other hand the property in the furniture was not to vest in the hirer until the whole of the payments had been made. On these facts it was held, when the hirer sold the furniture to an innocent third party, that the original owner could not recover it.[2] There was nothing in the agreement to enable the hirer to terminate it ; under it she was legally obliged to make the specified payments, and when they were made the furniture was hers ; she had therefore agreed to buy it when she made the contract.

Moreover, it is to be noticed in the application of the section now under discussion that, although an agreement to buy is usually unconditional, there is nothing to prevent the parties making it

[1] *Helly* v. *Matthews*, 1895, A. C. 471.

[2] *Lee* v. *Butler*, 1893, 2 Q. B. 318. This case was decided on sections 2 and 9 of the Factors Act, 1889, which contained a similar provision to that now under discussion.

conditional, and by so doing they do not exclude the operation of the section. Thus in *Marten* v. *Whale*,[1] the plaintiff entered into an agreement with one Thacker for the sale by Thacker to the plaintiff of a plot of land for the sum of £385, "subject to "purchaser's solicitors' approval of the title and "restrictions"; and in consideration of that transaction the plaintiff agreed to sell to Thacker a motor car for the sum of £300, "completion of such "sale and purchase to be carried out simultaneously "with above transaction." And it was held that assuming that the two transactions were dependent on each other, there was none the less agreement to buy within the meaning of the statute. "It is true "that the contract is subject to the condition that "the purchaser's solicitors shall approve of the "restrictions, but that does not prevent it from "being a contract. . . . Even assuming that the "two parts of the agreement are interdependent, "Thacker was a person who had agreed to buy the "car under a conditional contract and therefore "under a contract of sale within the meaning of "the Act."

[1] 1917, 2 K. B. 480.

CHAPTER V

PERFORMANCE OF THE CONTRACT

When a contract of sale of goods has been made it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract.[1] It follows, therefore, that this portion of our topic involves a discussion of two things—delivery and acceptance.

§ 1. Delivery

Delivery is defined by the Sale of Goods Act, as "voluntary transfer of possession from one person "to another."[2] But although delivery is a transfer of possession it does not necessarily involve a physical dealing with the goods sold passing them from the hands of the seller into those of the buyer. That is actual delivery. But the requirements of the Act may be satisfied by constructive delivery. As we have already seen,[3] a person has possession of an article when he intends to exercise over it a control whereby he may exclude others from its enjoyment, and, in addition to the mere intention, he is able, unless overpowered by violence, to exercise that

[1] 56 & 57 Vict. c. 71, s. 27. [2] *Ibid.*, s. 62 (1). [3] *Ante*, p. 42.

control. Delivery, therefore, consists in putting the buyer in such a position with reference to the goods as enables him to exercise that control. Thus where goods are stored in a warehouse, delivery may be made by handing over the key of the warehouse, because "it is the way of coming "at the possession, or to make use of the thing."[1] On the same principle where goods are on board ship, delivery of a bill of lading relating to the goods amounts to constructive delivery of them, because, by virtue of a well-known custom, the holder of a bill of lading is entitled to delivery of the goods to which it relates. Likewise where the seller, after the sale has been completed, agrees with the buyer to retain physical custody of the goods, but on such terms that the character of his former possession is changed from that of owner to that of bailee for the purchaser, there is again a constructive delivery, as in *Elmore* v. *Stone*,[2] where, after the sale of a horse, the buyer requested the seller, and the seller agreed, to keep it at livery, and in *Marvin* v. *Wallis*,[3] where, after the sale of a horse, the seller asked the purchaser to lend it to him and the purchaser consented.[4] And similarly where at the time of the sale the goods are in the possession of some third party,

[1] *Per* Ld. Hardwicke in *Ward* v. *Turner*, 1751, 2 Ves. Sen., at p. 443.
[2] 1809, 1 Taunt. 458. See *ante*, p. 12.
[3] 6 E. & B. 726.
[4] And see *Dublin City Distillery, Ltd.* v. *Doherty*, 1914, A. C. 823, where the authorities on constructive delivery are reviewed by Ld. Atkinson, at pp. 843 *et seq.*

such as a warehouseman, as bailee for the buyer, then, apart altogether from any question as to the transfer of documents of title, there is delivery to the buyer when, but not before, such third person acknowledges to the buyer that he holds the goods on his behalf.[1] And again there is constructive delivery in a case where one person is already in possession of another's property in some other capacity than that of buyer, such, for example, as the capacity of borrower, and the owner agrees to sell it to him.[2]

The Sale of Goods Act provides that "unless "otherwise agreed, delivery of the goods and pay- "ment of the price are concurrent conditions, that "is to say, the seller must be ready and willing to "give possession of the goods to the buyer in "exchange for the price, and the buyer must be "ready and willing to pay the price in exchange "for possession of the goods."[3] But this rule may be excluded by contrary agreement, as, for example, where goods are sold on credit, in which case the obligation to deliver is immediate.[4] As regards the place of delivery the Act provides: "Whether "it is for the buyer to take possession of the goods "or for the seller to send them to the buyer is a "question depending in each case on the contract,

[1] 56 & 57 Vict. c. 71, s. 29 (3).
[2] *Kilpin* v. *Ratley*, 1892, 1 Q. B. 582.
[3] 56 & 57 Vict. c. 71, s. 28.
[4] Unless the buyer becomes insolvent, as to which see *post*, pp. 105, 106.

" express or implied, between the parties. Apart " from any such contract, express or implied, the " place of delivery is the seller's place of business, " if he has one, and if not, his residence : Provided " that, if the contract be for the sale of specific " goods, which to the knowledge of the parties " when the contract is made are in some other " place, then that place is the place of delivery." [1] But where, by special agreement, express or implied, the seller is required to deliver the goods at the buyer's premises it is sufficient if, without negligence, he delivers them there to a person who has apparent authority to receive them. In *Galbraith and Grant* v. *Block* [2] a seller who was under obligation to deliver at the buyer's premises a case of champagne entrusted it to a carrier for delivery, and the carrier's driver delivered it to a man at a side door of the buyer's premises and some one on the premises signed the delivery sheet in the buyer's name ; but the buyer asserted that he never received the wine, that his premises were closed when it was delivered, that the signature on the delivery note was not his and he had not authorised any one to sign for him. It was held, however, that valid delivery had been made, because " a vendor who is told to deliver " goods at a purchaser's premises discharges his " obligation if he delivers them there without " negligence to a person apparently having authority

[1] 56 & 57 Vict. c. 71, s. 29 (1).

[2] 1922, 2 K. B. 155.

" to receive them. He cannot know what authority " the actual recipient has. His duty is to deliver " the goods at the proper place, and, of course, to " take all proper care to see that no unauthorised " person receives them. He is under no obligation " to do more. If the purchaser has been unfor- " tunate enough to have had access to his premises " obtained by some apparently respectable person " who takes his goods and signs for them in his " absence, the loss must fall on him, and not on " the innocent carrier or vendor."

The Act further provides that " where, in " pursuance of a contract of sale, the seller is " authorised or required to send the goods to " the buyer, delivery of the goods to a carrier, " whether named by the buyer or not, for the " purpose of transmission to the buyer is *primâ* " *facie* deemed to be a delivery of the goods to the " buyer," but " unless otherwise authorised by the " buyer, the seller must make such contract with " the carrier on behalf of the buyer as may be " reasonable having regard to the nature of the " goods and the other circumstances of the case," and " if the seller omit so to do, and the goods are " lost or damaged in course of transit, the buyer " may decline to treat the delivery to the carrier as " a delivery to himself, or may hold the seller " responsible in damages." [1] Where the place of

[1] 56 & 57 Vict. c 71, s 32 (1), (2).

delivery is distant, and the seller agrees to deliver the goods there at his own risk, the buyer must, nevertheless, unless it be otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.[1] But it is necessary to distinguish between such deterioration and loss caused by the seller's neglect to take ordinary precautions. For loss of this latter kind the seller himself is responsible ; and on that ground a seller was held liable where he deposited goods at the receiving house of a sea carrier whose liability was notoriously limited to five pounds and omitted to disclose the fact that the goods were of a higher value than that and to pay, as he might have done, an increased rate which would have ensured the carrier's liability.[2] Moreover, when the route by which the seller sends the goods to the buyer involves sea transit, under circumstances in which it is usual to insure, the seller, unless it is otherwise agreed, must give to the buyer such notice as may enable him to insure the goods during their sea transit, and, should the seller fail to do so, the goods will be at the seller's risk during the sea transit.[3]

Delivery must be of the exact quantity of goods

[1] 56 & 57 Vict. c. 71, s. 33.

[2] *Clarke* v. *Hutchins*, 14 East. 475.

[3] 56 & 57 Vict. c. 71, s. 32 (3). This applies to an f.o.b. contract, though delivery is complete when the goods are put on board : *Wimble* v. *Roseberg*, 1913, 3 K. B. 743. See *ante*, p. 64.

contracted for, and the Sale of Goods Act expressly provides :

> (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
>
> (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
>
> (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.[1]

These provisions, however, may be excluded by any usage of trade, special agreement, or course of dealing between the parties ;[2] and in practice contracts involving large quantities of goods sometimes contain words to the effect that the goods are " about " or " more or less " a certain quantity, or similar expressions. Such words may raise difficult questions of construction with regard to which no very definite rule can be formulated.

Each contract must be considered as a whole and on its own merits with a view to discovering whether the intention of the contracting parties was that the words under consideration should be

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[1] 56 & 57 Vict. c. 71, s. 30.

[2] *Ibid.*

taken as words of expectation or as words of contract, or, in other words, whether there is a contract for a specific bulk of goods which is estimated or expected to contain a certain quantity or whether, on the other hand, the parties contemplated more specifically the named quantity of goods. Where the words are held to be merely words of expectation the buyer must accept delivery of the bulk whatever quantity it may contain. In the recent case of *Re Harrison and Micks, Ltd.*,[1] there was a verbal agreement to purchase the remainder of a cargo of wheat from a certain vessel, the buyers stipulating that they should have the whole of it, and on the same day the seller sent to the buyers a written contract which stated that he sold to the buyers " the remainder " (of the cargo) " more or less about " 5,400 quarters Manitoba wheat." As a matter of fact the seller had made a miscalculation, and the remainder of the cargo contained 5,574 quarters. It was held that the buyers must accept that quantity; for the words " more or less about 5,400 " quarters," were merely words of estimate or expectation, and the subject-matter of the contract was the whole of the remainder of the cargo.

On the other hand, where the words under consideration are found to be words of contract the ordinary rule that delivery must be made of the exact quantity contracted for is subject to the

[1] 1917, 1 K. B. 755.

qualification that there may be a reasonable deviation between the quantity delivered and the contract quantity ; but " the direction to the jury has always " been that the deviation must not be very large. " The difference must be such as people would " ordinarily consider as included in the word " ' about.' "[1] The question thus becomes whether the deviation is reasonable. No definite rule can be laid down. It is a question of fact. In *Miller* v. *Borner & Co.*[2] an undertaking to load a " cargo of " ore, say about 2,800 tons," was held to be satisfied by putting on board 2,840 tons, the amount of deviation being held to be reasonable. But in *Morris* v. *Levison*,[3] where the contract was for " a " full and complete cargo, say about 1,100 tons " and the vessel would hold 1,210 tons, it was held that, although the words " say about 1,100 tons " were not mere words of expectation,[4] the contract was not satisfied by the delivery of 1,080 tons, because " it is a governing rule for the construction " of a contract that, if possible, a substantial meaning " must be given to every part of it. We have there- " fore, if possible, to give a meaning to the words " ' a full and complete cargo,' as well as to the " words ' say about.' It seems to me that we can

[1] *Per* Brett, J., in *Morris* v. *Levison*, 1876, 1 C. P. D. 155, at p. 158.
[2] 1900, 1 Q. B. 691.
[3] *Supra.*
[4] They could not be words of expectation since the carrying capacity of the vessel was much larger than anything which could be considered to be about the quantity specified.

" give effect to all the words used by holding the " meaning to be that the shipowner will be content " with a cargo of 1,100 tons if the ship will hold " more, and if she can only carry less, of course " the undertaking of the charterer would be fulfilled " by loading a complete cargo."

In the absence of agreement to the contrary the buyer is not obliged to accept delivery by instalments ;[1] for if the law were to provide otherwise it would place the buyer often in an absurd position. " Suppose," said Lord Bramwell in a well-known passage,[2] " a man orders a suit of clothes, the price " being £7—£4 for the coat, £2 for the trousers, " and £1 for the waistcoat—can he be made to take " the coat only, whether they were all to be delivered " together, or the trousers and waistcoat first ? The " party to a contract so broken has a right . . . to " declare he will not perform a part only of his " contract." But of course the parties may agree to delivery by instalments, and there are some cases in which, from the nature of the contract itself, such an agreement will be implied. " In many cases of " contract to supply a quantity of goods to be " delivered within a fixed period, the whole quantity " cannot, from the very nature of the case, be " delivered at one time, and it must frequently " happen, as in contracts for supplies of provision " for the army or navy, or any large establishments,

[1] 56 & 57 Vict. c. 71, s. 31 (1).
[2] *Honk* v. *Muller*, 1881, 7 Q. B. D., at p. 99.

" that the quantities first delivered are appropriated " and actually consumed by the persons to whom " they are delivered before the expiration of the " period within which the whole contract is to be " performed." [1]

When there is an agreement, express or implied, for delivery by instalments, and the instalments are to be paid for separately, the question may arise whether, in the event of the seller making defective deliveries in respect of one or more instalments, or the buyer neglecting or refusing to take delivery of or pay for one or more instalments, the breach is a repudiation of the whole contract or merely a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated. The answer to that question in each case depends on the terms of the contract and the circumstances of the case.[2] " The rule of law is " that where there is a contract in which there are two " parties, each side having to do something, if you " see that the failure to perform one part of it goes " to the root of the contract, it is a good defence to " say, ' I am not going to perform my part of it " ' when that which is at the root of the whole and " ' the substantial consideration for my perform- " ' ance is defeated by your misconduct.' " [3] Thus,

[1] *Per cur* in *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 1886, 12 A. C., at p. 138.

[2] 56 & 57 Vict. c. 71, s 31 (2)

[3] *Per* Ld. Blackburn in *Mersey Steel Co.* v *Naylor & Co.*, 1884, 9 A C. 434, at 443.

where buyers contracted to purchase from a company 5,000 tons of steel of the company's make, it was agreed that the steel should be delivered at the rate of 1,000 tons monthly, payment to be made within three days after receipt of shipping documents. Shortly before payments for two deliveries became due a petition was presented to wind up the company, and the buyers refused to make the payments unless the company obtained the consent of the Court. In doing this the buyers acted *bonâ fide* but on erroneous advice tendered by their solicitor who advised that such sanction was necessary, and they requested the company to apply to the Court for sanction. On these facts it was held that they had not shown an intention to repudiate the whole contract, and the company was not released from further performance. On the contrary the buyers, believing as they did that the sanction of the Court would be necessary to further performance, showed a desire that difficulties in the way of further performance should be removed when they requested the company to apply to the Court.[1]

§ 2. Acceptance

As regards acceptance it is provided that "the "buyer is deemed to have accepted the goods when "he intimates to the seller that he has accepted

[1] *Mersey Steel Co.* v. *Naylor & Co., supra.*

" them, or when the goods have been delivered to " him, and he does any act in relation to them which " is inconsistent with the ownership of the seller, " or when, after the lapse of a reasonable time, he " retains the goods without intimating to the seller " that he has rejected them." [1] Thus where, under a contract for the sale of a certain quantity of wheat, the wheat was delivered and the buyer, without making a proper examination of it, resold and delivered some of it to various sub-purchasers, it was held that, on subsequently making a further examination and finding that the wheat was not of the stipulated quantity, the buyer could not exercise his right of rejection,[2] for to re-sell the wheat was to do an act inconsistent with the seller's ownership. But such questions are easier to determine than those which arise in cases where it is claimed that acceptance is to be inferred from the fact that the seller has retained the goods after the lapse of a reasonable time ; for " the question of what is a " reasonable time is a question of fact." [3] But " where goods are delivered to the buyer, which he " has not previously examined, he is not deemed " to have accepted them unless and until he has " had a reasonable opportunity of examining them

[1] 56 & 57 Vict. c. 71, s. 35. Acceptance as the term is here used must be distinguished from acceptance under section 4, for an acceptance under section 4 need not necessarily be an acceptance in performance of the contract. *Ante*, p. 5.

[2] *Hardy & Co.* v. *Hillerns & Fowler*, 1923, 2 K. B. 490.

[3] 56 & 57 Vict. c. 71, s. 56.

"for the purpose of ascertaining whether they are "in conformity with the contract," and "unless "otherwise agreed, when the seller tenders delivery "of the goods to the buyer, he is bound, on request, "to afford the buyer a reasonable opportunity of "examining the goods for the purpose of ascer- "taining whether they are in conformity with the "contract."[1] Where the buyer, in a case where he has a right to do so, refuses to accept goods delivered to him, he is not bound, in the absence of contrary agreement, to return the goods to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.[2]

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[1] 56 & 57 Vict. c. 71, s. 34.

[2] *Ibid.*, s. 36.

CHAPTER VI

REMEDIES OF BUYER AND SELLER

§ 1. Buyer's Action for Damages

The normal remedy for breach of contract is an action for damages against the defaulting party. If the property in the goods has passed to the buyer[1] and the buyer is entitled to immediate possession of them but the seller withholds them, the buyer has the ordinary remedy of an owner deprived of his goods and may sue for damages for the wrongful detention of them. That remedy, however, is founded on tort, not on contract ; but, whether the property in the goods has passed or not, the buyer is entitled under the contract of sale to delivery in accordance with the rules which we have already discussed ;[2] and if the seller wrongfully neglects or refuses to deliver the goods to him the buyer may bring an action for damages for non-delivery,[3] and the Sale of Goods Act provides that " the measure " of damages is the estimated loss directly and " naturally resulting, in the ordinary course of " events, from the seller's breach of contract."[4]

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[1] *Ante*, p. 42 *et seq.*
[2] *Ante*, p. 79 *et seq.*
[3] 56 & 57 Vict. c. 71, s. 51 (1).
[4] *Ibid.*, s. 51 (2).

That provision, as the reader will perceive, is merely a re-statement, in statutory form, of the general rule with regard to damages for breach of contract; and the Act gives a particular application of it in the provision that "where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."[1] But it often happens that a buyer enters into a sub-contract to re-sell the goods to some third party, and the seller's failure to deliver renders the buyer unable to fulfil his obligations under such sub-contract; and the question then arises whether the buyer can claim as damages the profit which he would have made on the sub-contract, had he been able to fulfil it, and also any liability incurred to the other party to the sub-contract by reason of its non-fulfilment. Normally such damages cannot be recovered; for they cannot be said to be "loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." It is expressly provided, however, that the Sale of Goods Act does

[1] 56 & 57 Vict. c. 71, s. 51 (3). The concluding words of this sub-section are not applicable to an anticipatory breach of a contract to deliver within a reasonable time: *Miller* v. *Van Heeck & Co.*, 1921, 2 K. B. 369.

not affect the right of the buyer or the seller to recover special damages in any case where by law special damages are recoverable ;[1] and it is well settled that a party suing for breach of contract may recover as special damages loss which, while not arising naturally and according to the usual course of things from the breach complained of, is nevertheless "such as may reasonably be supposed to "have been in contemplation of both parties, at the "time they made the contract, as the probable "result of the breach of it."[2] From that it follows that if, at the time when the contract was made, the seller knew that the goods were intended by the buyer to fulfil a sub-contract, then, on breach of contract by the seller, the buyer may recover as special damages, the amount of any profit which he would have made on the sub-contract and of any liability incurred by him to the other party thereto by reason of the non-fulfilment of it, together with any costs reasonably incurred in defending an action brought against him on it.[3] And on the same principle, although the buyer cannot as a rule recover compensation for extraordinary loss of any kind resulting from the seller's breach of contract, yet he may do so if the seller, when the contract was

[1] 56 & 57 Vict. c. 71, s. 54.

[2] *Per* Alderson, B., *in Hadley* v. *Baxendale*, 1854, 9 Ex. 341, at p. 354.

[3] See *Grébert-Borgnis* v. *J. & W. Nugent*, 1885, 15 Q. B. D. 85 ; *Hammond* v. *Bussey*, 1887, 20 Q. B. D. 79 ; *Aguis* v. *Great Western Colliery Co.*, 1899, 1 Q. B. 413.

made, had notice of special facts which showed that loss of that kind would be a probable result of breach of contract on his part.[1]

§ 2. Specific Performance

But the buyer's remedies are not confined to an action for damages. He may, in special cases, obtain from the Court an order for specific performance of the contract. The Sale of Goods Act provides :

> In any action for breach of contract to deliver specific or ascertained goods the court may, if it think fit, on the application of the plaintiff, by its judgment . . . direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem fit.[2]

It should be noticed that this section merely gives statutory statement to an equitable jurisdiction which, apart altogether from the Sale of Goods Act, the Court would possess.

Specific performance, however, is an extraordinary remedy which will only be granted in extraordinary cases.[3] Thus it is a well-established rule of equity that specific performance will only be

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[1] See *Cory* v. *Thames Ironworks Co.*, 1868, L. R. 3 Q. B. 181 ; *Horne* v. *Midland Rly. Co.*, 1873, L. R. 8 C. P. 131.

[2] 56 & 57 Vict. c. 71, s. 52.

[3] See Fry, *Specific Performance*.

ordered in those cases where the Court can effectually superintend and enforce the carrying out of its own decree ; and, although the point has not yet been decided, it would seem to follow that specific performance would not be decreed of a contract for the delivery of goods by instalments, for it might require the constant supervision of the Court to see that each instalment was delivered. It is on the same ground that the section above quoted confines the remedy to cases where the goods in question are specific or ascertained ; for if the Court were to order specific performance of a contract for the sale of unascertained goods, the Court itself might have to ascertain the goods which were to be delivered. Thus where sellers contracted to supply on certain terms " all the coal that may be required " for the buyers' works it was held that the contract was not one which would be specifically enforced.[1]

Nor is the fact that the goods are ascertained in itself sufficient to induce the Court to grant this extraordinary remedy. Equity developed th remedy of specific performance in order to correc the deficiencies of the common law in those cases where the common law provided no remedy or only an inadequate remedy ; and so it is a fundamental rule that specific performance will never be decreed in any case in which damages would afford adequate compensation to the injured party ; and

[1] *Dominion Coal Co.* v. *Dominion Iron and Steel Co.*, 1909, A. C. 293.

this rule precludes specific performance of most contracts for the sale of goods. "If a contract is "for the purchase of a certain quantity of coals, ". . . this Court will not decree specific perform- "ance, because a person can go into the market "and buy similar articles, and get damages for the "difference in the price of the articles in a Court of "Law."[1] It is only in exceptional cases that specific performance will be decreed of a contract for the sale and delivery of specific goods; as, for example, where the article in question is unique, such as some unique curiosity or work of art, or where, as in the case of an heirloom, it possesses some peculiar value to the buyer over and above the ordinary market value of similar goods.[2] The normal remedy of the buyer is an action for damages for non-delivery.[3]

§ 3. Rights of the Seller

The seller has corresponding rights of action if the buyer neglects or refuses to perform his side of the contract. Thus it is provided that "where, "under a contract of sale, the property in the goods "has passed to the buyer, and the buyer wrongfully "neglects or refuses to pay for the goods according

[1] *Per* Kindersley, V.-C., in *Falcke* v. *Gray*, 1859, 4 Drew., at p. 658.
[2] See *Duke of Somerset* v. *Cookson*, 1735, 3 P. Wms. 390.
[3] As to the remedies for breach of conditions and warranties, see *ante*, pp. 25, 26.

" to the terms of the contract, the seller may main-
" tain an action against him for the price of the
" goods." [1] Normally, as we have seen,[2] delivery of the goods and payment of the price are concurrent conditions ; but the contract may provide for payment irrespective of delivery ; and it is enacted that " where, under a contract of sale, the price is
" payable on a day certain irrespective of delivery,
" and the buyer wrongfully neglects or refuses to
" pay such price, the seller may maintain an action
" for the price, although the property in the goods
" has not passed, and the goods have not been appro-
" priated to the contract." [3] The buyer may also break the contract by non-acceptance ; and, therefore, it is provided that " where the buyer wrong-
" fully neglects or refuses to accept and pay for the
" goods, the seller may maintain an action against
" him for damages for non-acceptance " ; [4] and in such an action, as in a buyer's action for non-delivery, " the measure of damages is the estimated
" loss directly and naturally resulting, in the
" ordinary course of events, from the buyer's breach
" of contract," [5] and " where there is an available
" market for the goods in question the measure of
" damages is *primâ facie* to be ascertained by the
" difference between the contract price and the
" market or current price at the time or times when

[1] 56 & 57 Vict. c. 71, s. 49 (1).
[2] *Ante*, p. 81.
[3] 56 & 57 Vict. c. 71, s. 49 (2).
[4] *Ibid.*, s. 50 (1)
[5] *Ibid.*, s. 50 (2).

"the goods ought to have been accepted, or, if no "time was fixed for acceptance, then at the time "of refusal to accept."[1] These rules, however, refer to general damages; and they do not exclude special damages in a proper case,[2] and where the seller claims special damages they are calculated on the same principles as have already been discussed in connection with the buyer's action for non-delivery.[3]

In addition to these remedies by way of action, the Sale of Goods Act gives to the seller, in certain defined circumstances, certain rights against the goods themselves; but to be able to claim these rights he must be an *unpaid seller* within the meaning of the Act which defines an unpaid seller as one to whom the whole of the price has not been paid or tendered, or who has received as conditional payment a bill of exchange or other negotiable instrument which has been subsequently dishonoured.[4] To such an unpaid seller the Act gives by implication of law, in certain circumstances, three rights against the goods themselves, namely: (*a*) a lien

[1] 56 & 57 Vict. c. 71, s. 50 (3).
[2] *Ibid.*, s. 54.
[3] *Ante*, p. 95.
[4] 56 & 57 Vict. c. 71, s. 38. The term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.—*Ibid.*

on the goods for the price while he is in possession of them ; (*b*) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them ; (*c*) a right of re-sale as limited by the Act.[1] It remains to discuss each of these rights in more detail.

§ 4. Lien

A lien is the right of a creditor who is in possession of goods belonging to his debtor to retain possession of them until the creditor is induced by the inconvenience of being kept out of possession to pay or tender the amount of the debt. A lien is essentially a right over the property of another. A man cannot have a lien over goods belonging to himself, and consequently, unless the property in the goods has passed to the buyer, the unpaid seller cannot claim over them a lien in the strict sense of that term, though the Act gives to him an analogous right of withholding delivery similar to and co-extensive with his right of lien.[2] Moreover, the unpaid seller's lien is a lien for the price only ; and when the price has been paid or tendered it does not enable him to retain possession of the goods any longer or for any other purpose. Consequently, where a seller sought to retain possession of goods until he had been paid, in addition to the price,

[1] *56 & 57* Vict. c. 71, s. 39 (1).
[2] *Ibid.*, s. 39.

the cost of storing the goods during the exercise of the lien, it was held that he could not do so.[1]

Nor can the seller exercise his lien merely because he is an unpaid seller within the meaning of the Act ; there must, in addition, be at least one of the following conditions satisfied[2] :—

(*a*) The goods must have been sold without any stipulation as to credit ; or

(*b*) If the goods have been sold on credit, the term of credit must have expired ;[3] or

(*c*) The buyer must have become insolvent.[4]

On the other hand, the unpaid seller loses his lien on the goods :

(*a*) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving a right of disposal ;

(*b*) Where the buyer or his agent lawfully obtains possession of the goods ;

(*c*) By waiver thereof.[5]

[1] *British Empire Shipping Co.* v. *Somes*, 1860, 8 H. L. Cas. 338.

[2] 56 & 57 Vict. c. 71, s. 41 (1).

[3] Where goods are sold on credit the lien cannot be exercised during the term of the credit, unless there is a trade usage to the contrary.

[4] A person is deemed to be insolvent within the meaning of the Act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not : 56 & 57 Vict. c. 71, s. 62 (3). It has been held that if, while the buyer is solvent, the seller breaks his contract to deliver, and the buyer subsequently becomes insolvent, the lien revives : *Valpy* v. *Oakeley*, 1851, 16 Q. B. 941.

[5] 56 & 57 Vict. c. 71, s. 43. But he does not lose his lien by reason only that he has obtained judgment for the price of the goods.—*Ibid.*

The lien is founded on possession, and once possession is lost the lien, as a rule, is lost also. There is, however, one case to which this rule does not apply. Possession may change although the vendor retains the actual custody of the goods ;[1] and therefore if an unpaid seller, whilst retaining the goods in his custody, became bailee of the goods for the buyer he ought, logically, to lose his lien, and this was the law before the Sale of Goods Act was passed.[2] But that Act now provides that the seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.[3]

The lien, however, may be lost by waiver, that is, by conduct on the part of the seller which is inconsistent with the continuance of the lien. Such waiver, of course, may be express. But it may also be implied from circumstances. Thus, where an unpaid seller of goods assented to a sub-sale of them by the purchaser, it was held that he could not claim to exercise his lien as against the purchaser under the sub-sale, for his assent to the sub-sale amounted to an implied repudiation of the lien ;[4] and the seller, by the terms of the contract of sale, may reserve an express lien which excludes the implied one given by the Act.[5] But the mere

[1] *Ante*, p. 80.
[2] See *Cusack* v. *Robinson*, 1861, 30 L. J. Q. B. at 264.
[3] 56 & 57 Vict. c. 71, s. 41 (2).
[4] *Knights* v. *Wiffen*, 1870, L. R. 5 Q. B. 660.
[5] *Re Leith's Estate*, 1866, L. R. 1 P. C., at p. 305.

fact that the unpaid seller has made part delivery of the goods does not of itself deprive him of his right of lien on the remainder, unless the circumstances under which such part delivery was made show an agreement to waive the lien.[1] In other words, the lien is only lost in such cases if it appears that both parties intended the part delivery to be regarded as constructive delivery of the whole.[2] Thus A. sold to B. forty-six puncheons of rum lying in the warehouse of a third party at Liverpool, and B. re-sold them to C. to whom he gave an invoice specifying the marks and numbers of each puncheon, and C. accepted certain bills of exchange for the price. The invariable mode of delivering goods sold while in warehouse in Liverpool was for the seller to hand a delivery order to the purchaser; but in the present case B. declined to give delivery orders except for two puncheons which C. received. When later the bills accepted by C. were dishonoured it was held that B. had a lien on the rum which had not been delivered. "While the bills were running, "C. had the power to take the rum into his pos- "session, and to dispose of and sell it, but he did "not exercise that power by any sufficient means ". . . [because] C. obtained no delivery orders "except for two puncheons. It is said that delivery "of a part operates in law as a constructive delivery

[1] 56 & 57 Vict. c. 71, s. 42.

[2] See the words of Ld. Blackburn in *Kemp* v. *Falk*, 1882, 7 A. C. 573, at p. 586.

"of the whole; but that is so only where the "delivery of part is intended to be a delivery of the "whole. Here that was not so; for the plaintiffs, "by refusing to deliver more than the two pun- "cheons, gave notice to C. that they meant to retain "the possession of the rest."[1]

§ 5. Stoppage in Transitu

The vendor's lien is founded on possession, and as we have seen,[2] it is usually lost when possession is lost. The Sale of Goods Act, however, provides a means whereby, under certain circumstances, possession once lost may be regained, for it enacts:

> When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods so long as they are in the course of transit, and may retain them until payment or tender of the price.[3]

The reader should notice that this right arises only in the event of the insolvency[4] of the buyer. The unpaid seller may, if he wishes, anticipate events and stop the goods in transit before the insolvency of the buyer actually occurs, but by so doing he runs some risk, because if it should happen, at the time when delivery is due, that the buyer is solvent,

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[1] *Dixon* v. *Yates*, 1833, 5 B. & Ad. 313.
[2] *Ante*, p. 103.
[3] 56 & 57 Vict. c. 71, s. 44.
[4] For the definition of insolvency, see *ante*, p. 102, *n.*

the seller will be liable to deliver and may further be liable for expenses.[1]

In any case, the right may only be exercised so long as the goods are in the course of transit. The duration of transit is, therefore, a question of considerable practical importance. The Sale of Goods Act provides that "goods are deemed to be in "course of transit from the time when they are "delivered to a carrier by land or water, or other "bailee . . . for the purpose of transmission to "the buyer, until the buyer, or his agent in that "behalf, takes delivery of them from such carrier "or other bailee."[2] "The essence of stoppage *in* "*transitu*," it has been said,[3] "is that the goods "should be in the possession of a middleman." The rule is not difficult to apply in cases where the goods are sent direct between the buyer and the seller. The goods are then *in transitu* until they are delivered to the seller, and it is not necessary that the goods should be actually in motion, for "if the goods are deposited with one who holds "them merely as an agent to forward and has the "custody as such, they are as much *in transitu* as "if they were actually moving."[4]

But sometimes it is agreed that the goods shall be sent to some intermediate place, and the question

[1] *The Constantia*, 1807, Rob. Ad. R. 321.

[2] 56 & 57 Vict. c. 71, s. 45 (1).

[3] *Per* Ld. Cairns in *Schotsmans* v. *L. & Y. Rly.*, 1867, L. R. 2 Ch. App., at p. 338.

[4] *Blackburn on Sale*, p. 244.

then arises as to whether delivery of them at that place terminates transit or transit continues until the goods reach their ultimate destination. Thus A., in India, may order goods from B., in Manchester, to be sent to London, whence they are to be forwarded to India. Does transit terminate when the goods reach London or not until they reach India? The answer to that question depends on whether the intermediate place is merely, so to speak, a place of rest in the course of one journey which stretches to the ultimate destination, or whether, having reached the intermediate place, the goods cannot again be set in motion without fresh orders from the purchaser.[1] In the latter case transit ends at the intermediate place; but in the former case transit continues until the goods arrive at their ultimate destination, and the mere fact that the goods are no longer in the hands of the person to whom the seller entrusted them for transmission is immaterial, for transit continues no matter how many persons' hands the goods pass through until the goods are delivered at their destination. "Nothing is clearer than that it is not delivery to "any agent which terminates the transit. If the "delivery be to an agent to hold for the vendee or "to await further instructions for the dispatch of "the goods, then, no doubt, the transit is at an end; "but where it is only to an agent or agents whose

[1] See the words of Ld. Ellenborough in *Dixon* v. *Baldwen*, 1804, 5 East. 175, at p. 186.

"sole duty is to transmit the goods, then, however "many agents' hands the goods pass through, while "they are in the hands of any such agents, the "*transitus* continues." [1] Thus, the buyers of goods instructed the sellers in the following terms: "Please consign the 10 hhds. hollow ware to the "*Darling Downs*, to Melbourne, loading in the "East India Docks. To come up at once." The buyers became insolvent, and the sellers claimed to stop the goods after they had been put on board the vessel named; and it was held that they were entitled to do so, because "where the transit is a "transit which has been caused either by the terms "of the contract, or by the directions of the pur-"chaser to the vendor, the right of stoppage *in* "*transitu* exists." [2] But in another case London traders ordered from Manchester cotton merchants goods to be sent to a firm at Hull for the purpose of being shipped "as usual." It was intended that the goods should be shipped to the purchasers' correspondents at Hamburg, but the evidence showed that the usual course of dealing between the parties was for the firm at Hull, after receiving goods, to await further orders from the purchasers as to their disposal; and it was held, therefore, that the transit was at an end when the goods were delivered to the firm at Hull, because "the goods

[1] *Per* Fry, L.J., in *Bethell* v. *Clark*, 1888, 20 Q. B. D. 615, at p. 619.
[2] *Bethell* v. *Clark*, *supra*.

" had so far gotten to the end of their journey, that " they waited for new orders from the purchaser to " put them again in motion, to communicate to " them another substantive destination."[1] And, on the same principle, the Sale of Goods Act provides that " if, after the arrival of the goods at the " appointed destination, the carrier or other bailee " . . . acknowledges to the buyer or his agent, " that he holds the goods on his behalf, and con- " tinues in possession of them as bailee . . . for " the buyer, or his agent, the transit is at an end, " and it is immaterial that a further destination for " the goods may have been indicated by the buyer."[2]

A case of some difficulty arises where the goods are delivered to a ship chartered by the buyer. The Sale of Goods Act provides that " it is a question " depending on the circumstances of the particular " case, whether they are in the possession of the " master as a carrier, or as agent to the buyer."[3] Of course, if the ship be *owned* by the buyer, transit is usually at an end as soon as the goods are put on board.[4] But where the purchaser of the goods is merely the charterer of the ship the test appears to be whether the master of the vessel is the servant of the shipowner or of the charterer.[5] If the master

[1] *Dixon* v. *Baldwen*, *supra*.

[2] 56 & 57 Vict. c. 71, s. 45 (3).

[3] *Ibid.*, s. 45 (5).

[4] *Schotsmans* v. *L. & Y. Rly. Co.*, 1867, L. R. 2 Ch. App. 332.

[5] See *Berndtson* v. *Strang*, 1867, L. R. 4 Eq. 481; 3 Ch. App., at p. 590.

is the servant of the charterer and bound to deal with the goods according to his directions, transit is at an end as soon as the goods are put on board, because then it may be said that the buyer's agent has taken delivery of the goods which may be regarded as being at their appointed destination. But, on the other hand, where the master of the ship is the servant of the shipowner, the goods are delivered to him in the capacity of carrier, and the appointed destination, as a rule, is the place to which he is to carry the goods, and it is there usually that transit ends.

Transit must come to an end when the goods reach the destination appointed by the contract or by the buyer's directions to the seller's; but it may come to an end before, for the Sale of Goods Act provides that "if the buyer or his agent obtains "delivery of the goods before their arrival at the "appointed destination, the transit is at an end."[1] And, therefore, in a case where the contract provided that the goods should be sent to the buyer's wharf near London Bridge, and the buyer went down the river and met the vessel in which they were being carried and had the goods transferred from that vessel to his own barge, it was held that the transit was at an end.[2] "The principle to be "deduced from [the authorities] is, that where

[1] 56 & 57 Vict. c 71, s. 45 (2).
[2] *Whitehead* v. *Anderson*, 1842, 9 M. & W. 518.

" goods are sold to be sent to a particular destina-
" tion, the *transitus* is not at an end until the goods
" have reached the place named by the vendee to
" the vendor as their destination. One exception,
" at least, is to be found in the principle here laid
" down : the vendee can always anticipate the place
" of destination, if he can succeed in getting the
" goods out of the hands of the carrier. In that
" case the transit is at an end, whatever may have
" been said as to the place of destination, and this
" shows that the real test is not what is said but what
" is done."[1] But although the buyer may thus abbreviate the transit, the carrier cannot, on the other hand, prolong it, and " where the carrier or " other bailee . . . wrongfully refuses to deliver " the goods to the buyer, or his agent in that " behalf, the transit is deemed to be at an end."[2] But, conversely, " if the goods are rejected by the " buyer, and the carrier or other bailee . . . con-
" tinues in possession of them, the transit is not
" deemed to be at an end, even if the seller has
" refused to receive them back."[3]

In order to stop the goods *in transitu* it is not necessary for the seller to recover actual corporeal possession of them. " The unpaid seller may " exercise his right of stoppage *in transitu* either by

[1] *Per* Bowen, L.J., in *Kendal* v. *Marshall*, 1883, 11 Q. B. D. 356, at p. 369. And see *Reddall* v. *Union Castle Steamship Co.*, 1914, 20 Com. Cas. 86.

[2] 56 & 57 Vict. c. 71, s. 45 (6).

[3] *Ibid.*, s. 45 (4).

"taking actual possession of the goods, or by "giving notice of his claim to the carrier or other "bailee . . . in whose possession the goods are. "Such notice may be given either to the person in "actual possession of the goods or to his principal. "In the latter case the notice, to be effectual, must "be given at such time and under such circum-"stances that the principal, by the exercise of "reasonable diligence, may communicate it to his "servant or agent in time to prevent a delivery to "the buyer."[1] If the seller stops part of the goods *in transitu*, the stoppage has no effect on the remainder, though the contract is entire;[2] but, on the other hand, if he makes part delivery of the goods to the buyer, or his agent in that behalf, he can stop the remainder, unless such part delivery was made under such circumstances as to show an agreement to give up possession of the whole of the goods.[3]

Where the carrier or other bailee in possession of the goods receives notice of stoppage *in transitu* from the seller, it is his duty to re-deliver the goods to, or according to the directions of, the seller; but the seller must bear the expenses of such re-delivery.[4] Thus, where the carrier has, as is often the case, a general lien on the goods for the

[1] 56 & 57 Vict. c. 71, s. 46 (1).
[2] *Wentworth* v. *Outhwaite*, 1842, 10 M. & W. 436.
[3] 56 & 57 Vict. c. 70, s. 45 (7), and see *ante*, p. 104.
[4] 56 & 57 Vict. c. 71, s. 45 (2).

cost of their carriage, the unpaid seller's right of stoppage *in transitu* is subject to that lien and he must discharge the cost of carriage before he can resume possession of the goods.[1] But, in the absence of sufficient evidence of an agreement to the contrary, the right of stoppage *in transitu* is not subject to any general lien which the carrier may have, as against the consignee of the goods, for charges not connected with the carriage of those particular goods. In a recent case, sellers delivered goods to a railway company for carriage to the buyers upon the terms of a consignment note which gave to the railway company a particular lien for money to them for the carriage of and other charges upon the goods and also a general lien for any moneys due to them from the owners of such goods upon any account. The sellers paid to the railway company all freight and charges in respect of the carriage of the goods. While the goods were still in transit the sellers received notice that the buyers were insolvent and, being unpaid, they gave to the railway company notice of stoppage. In the meantime the buyers had become owners of the goods by indorsement and delivery of a bill of lading, and the railway company claimed, under the terms of the consignment note, that they had a lien as against the sellers in respect of a sum of money due from the buyers to the company on a general account. It was held,

[1] See *Booth Steamship Co.* v. *Cargo Fleet Iron Co.*, 1916, 2 K. B. 570.

however, that this general lien did not rank in priority to the unpaid seller's right of stoppage *in transitu*.[1]

As a rule the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; but if a document of title relating to the goods is transferred to any person as buyer or owner of the goods, and that person transfers the document to any one taking it in good faith and for valuable consideration, then, if such transfer was by way of sale, the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee.[2]

On the other hand, the contract of sale is not rescinded merely because the unpaid seller exercises his lien or right of stoppage *in transitu*.[3] The object of the lien is to enable the unpaid seller to retain possession of the goods until the buyer is compelled by the inconvenience of being kept out of possession to pay or tender the price; and the object of the right of stoppage *in transitu* is merely

[1] *United States Steel Products Co.* v. *G. W. Rly.*, 1916, 2 A. C. 189.

[2] 56 & 57 Vict. c. 71, s. 47. And see *Ant. Urgens Margarine fabricken* v. *Louis Dreyfus & Co.*, 1914, 3 K. B. 41. Cf. *Mordaunt Bros.* v. *British Oil and Cake Mills*, 1910, 2 K. B. 502.

[3] 56 & 57 Vict. c. 71, s. 48 (1).

to enable him, having once allowed the goods to go out of his possession, to resume his lien in the event of the buyer's insolvency. The contract still subsists and the seller still remains bound to deliver the goods to the buyer on payment or tender of the price, and the property in the goods, which has vested in the buyer, still remains in him. If, therefore, the seller, whilst in possession of the goods under his right of lien or stoppage *in transitu* re-sells them to a third party, he puts himself in such a position that he cannot fulfil his contract. Logically, in such a case no property in the goods ought to vest in the third party to whom they are re-sold, for the seller himself has no property in them. At one time, in fact, this was the law,[1] and the original buyer could follow the goods into the hands of an innocent third party. It was deemed, however, that this rule might cause hardship to innocent third parties; and the Sale of Goods Act now provides that where an unpaid seller who has exercised his right of lien on stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.[2]

§ 6. Right of Re-sale

This provision, however, only protects the person who buys the goods; it gives no protection

[1] See *Langton* v. *Higgins*, 1859, 28 L. J. Ex. 252.
[2] 56 & 57 Vict. c. 71, s. 48 (2).

to the unpaid seller who sells them to him. As between the unpaid seller and the original buyer the former, as a rule, has no right of re-sale. On grounds of convenience, however, the Sale of Goods Act gives him such a right in three, but only three, cases, and the unpaid seller may re-sell the goods :

(1) Where a right of re-sale is expressly reserved by the terms of the contract ; [1]

(2) Where the goods are of a perishable nature ; [2] or

(3) Where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price.[3]

In these cases the unpaid seller may re-sell ; and he has also against the buyer a claim for damages for breach of contract.[4]

[1] 56 & 57 Vict. c 71, s. 48 (4).
[2] *Ibid.*, s. 48 (3).
[3] *Ibid.*
[4] *Semble*, in a proper case the seller in possession of goods might re-sell them as agent by necessity : see *Prager* v. *Blatspiel*, 1924, 1 K. B. 566.

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